46 Am. Jur. 2d Judges Summary

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

Correlation Table

Summary

Scope:
This article discusses matters pertaining to judges, generally, in their personal character and relations, including selection and tenure; powers and duties; privileges and disabilities; compensation; liabilities; qualification or disqualification to act in particular instances; and vacancies in office. De facto judges and special, substitute, and pro tem judges are also discussed.

Federal Aspects:
Principles applicable to federal judges, and pertinent provisions of the Constitution and federal statutes, are considered in Am. Jur. 2d, Federal Courts §§ 18 to 109.

Treated Elsewhere:
Acknowledgment, authority of judge to take, see Am. Jur. 2d, Acknowledgments § 9

Administrative judges, see Am. Jur. 2d, Administrative Law §§ 300 to 308

Alternative dispute resolution proceedings, see Am. Jur. 2d, Alternative Dispute Resolution §§ 1 et seq.

Arrest, exception of judges from, see Am. Jur. 2d, Arrest § 111

Attorneys' communications with judge, see Am. Jur. 2d, Attorneys at Law § 47

Civil process, exception of judges from, see Am. Jur. 2d, Process § 16

Contempt of court, see Am. Jur. 2d, Contempt §§ 1 et seq.

Courts, operation of, generally, see Am. Jur. 2d, Courts §§ 1 et seq.

Discipline of attorney for criticism of judicial acts, see Am. Jur. 2d, Attorneys at Law § 51

Drain or drainage district, disqualification of judge, see Am. Jur. 2d, Drains and Drainage Districts § 16

Federal judges as government employees under Federal Tort Claims Act, see Am. Jur. 2d, Federal Tort Claims Act § 8

Judges in District of Columbia, see Am. Jur. 2d, District of Columbia § 21

Judges of particular courts, see Am. Jur. 2d, Federal Courts §§ 18 to 148; Am. Jur. 2d, Juvenile Courts and Delinquent and Dependent Children §§ 1 et seq.

Judicial councils, generally, see Am. Jur. 2d, Judicial Councils and Conferences §§ 1 to 3

Judicial supervision of legal profession, see Am. Jur. 2d, Attorneys at Law §§ 13 to 136

Justices of the peace, see Am. Jur. 2d, Justices of the Peace §§ 1 et seq.

Law relating to public officers, generally, see Am. Jur. 2d, Public Officers and Employees §§ 1 et seq.

Mandamus to compel judicial action, see Am. Jur. 2d, Mandamus §§ 300 to 368

Marriage ceremony, authority of judge to perform, see Am. Jur. 2d, Marriage § 35

Occupied territory, appointment of judges in, see Am. Jur. 2d, War § 121

Referee, judge as, see Am. Jur. 2d, References § 20

Trials, powers and duties of judges with respect to, see Am. Jur. 2d, Trial §§ 1 et seq.

Venue, change of for bias or prejudice of judge, see Am. Jur. 2d, Venue § 58

46 Am. Jur. 2d Judges I Refs.

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

I. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 1, 2

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 1, 2

End of Document

46 Am. Jur. 2d Judges § 1

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

I. In General

§ 1. Definition and characterization of judges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 1, 2

A judge is generally defined as a public officer authorized by law to hear and determine causes and to hold court for that purpose.[1] The term "judge" may also be more broadly defined as meaning any public officer performing judicial functions.[2] The term includes every judicial officer authorized, alone or with others, to hold or preside over a court of record, but in its most extensive sense, it includes all officers appointed to decide litigated questions,[3] and there exists a presumption of honesty and integrity in those serving as an adjudicator.[4] "Judge" also includes a judge pro tempore, which is defined as a person who is appointed to act temporarily as a judge.[5] In addition, the term "judge" as used in the code of judicial conduct includes a candidate for a judicial position.[6]

Footnotes

1 Schuster v. Raflowitz, 245 A.D. 248, 281 N.Y.S. 379 (3d Dep't 1935).

2 Todd v. U.S., 158 U.S. 278, 15 S. Ct. 889, 39 L. Ed. 982 (1895).

3 Babigan v. Wachtler, 133 Misc. 2d 111, 506 N.Y.S.2d 506 (Sup 1986), judgment aff'd, 126 A.D.2d 445, 510 N.Y.S.2d 473 (1st Dep't 1987), order aff'd, 69 N.Y.2d 1012, 517 N.Y.S.2d 905, 511 N.E.2d 49 (1987).
As to magistrates, generally, see § 2.
As to justices of the peace, see Am. Jur. 2d, Justices of the Peace §§ 1 et seq.
As to judges of juvenile courts, see Am. Jur. 2d, Juvenile Courts and Delinquent and Dependent Children § 6.
As to members of courts-martial, see Am. Jur. 2d, Military and Civil Defense §§ 226, 227.

4 Romig v. Jefferson-Pilot Life Ins. Co., 132 N.C. App. 682, 513 S.E.2d 598 (1999), aff'd, 351 N.C. 349, 524 S.E.2d 804 (2000).

5 Mississippi Judicial Performance Com'n v. Thomas, 549 So. 2d 962 (Miss. 1989).
As to pro tem judges, generally, see §§ 232 to 252.

[6] In re Fadeley, 310 Or. 548, 802 P.2d 31 (1990).

End of Document

46 Am. Jur. 2d Judges § 2

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

I. In General

§ 2. Magistrates

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 1, 2

A.L.R. Library

Civil jurisdiction of magistrates under Federal Magistrates Act of 1968 (28 U.S.C.A. secs. 631 et seq.), 128 A.L.R. Fed. 115

Criminal jurisdiction of magistrate under Federal Magistrates Act of 1968 (29 U.S.C.A. secs. 631 et seq.), 127 A.L.R. Fed. 309

A magistrate is usually considered to be an inferior judicial officer.[1] However, the term "magistrate" is not confined to justices of the peace and other persons who exercise judicial powers, but includes others whose duties are strictly executive.[2]

The Office of United States Magistrates is provided for by federal statute.[3]

Footnotes

1 Compton v. State of Alabama, 214 U.S. 1, 29 S. Ct. 605, 53 L. Ed. 885 (1909).
As to justices of the peace, generally, see Am. Jur. 2d, Justices of the Peace §§ 1 et seq.

2 Compton v. State of Alabama, 214 U.S. 1, 29 S. Ct. 605, 53 L. Ed. 885 (1909).

3 28 U.S.C.A. §§ 631 to 639.
As to the criminal jurisdiction of federal magistrates, see Am. Jur. 2d, Criminal Law §§ 449, 450.

End of Document

46 Am. Jur. 2d Judges § 3

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

I. In General

§ 3. Constitutional or legislative power to create judge's office

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 1, 2

The office of judge may be created by constitutional provision[1] or at the discretion of the legislature.[2]

Some state constitutions provide that an area is entitled to a judge in a particular court for a specified number of people or major fraction thereof; such a provision is self-executing.[3] Even where the constitution lacks such a provision, the legislature may provide for the automatic creation of judgeships in an area based on increases in population.[4]

Footnotes

1 Gray v. Bryant, 125 So. 2d 846 (Fla. 1960).

2 In re Carroll, 91 Kan. 395, 137 P. 975 (1914).
As to the creation of courts, see Am. Jur. 2d, Courts §§ 4 to 6.

3 Gray v. Bryant, 125 So. 2d 846 (Fla. 1960).

4 Dobbs v. Board of County Com'rs of Oklahoma County, 1953 OK 159, 208 Okla. 514, 257 P.2d 802 (1953).

End of Document

46 Am. Jur. 2d Judges § 4

American Jurisprudence, Second Edition | May 2021 Update

Judges
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I. In General

§ 4. Legislative power to abolish judge's office

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 1, 2

The legislature generally cannot deprive a judge of the office or of the right to exercise the duties arising from that office by abolishing the court or the judicial district to which the judge was elected prior to the expiration of the judge's term as that term is fixed by a state constitution.[1]

Statutes abolishing courts sometimes contain saving clauses to the effect that they will not affect the tenure of the judges.[2]

A statute abolishing an existing office and creating the office of judge in its place is not invalid as an attempt to legislate the incumbent of the first office out of office, where the form and structure of the two offices are substantially different.[3]

Where the executive branch has exclusive authority to appoint judicial officers, a statute declaring the office of chief justice administrative and providing for the manner of their selection and term of office has been found unconstitutional and an impermissible encroachment on the independence of the judiciary.[4]

Footnotes

1 State v. Friedley, 135 Ind. 119, 34 N.E. 872 (1893).
As to the abolition of courts, see Am. Jur. 2d, Courts § 7.

2 Donegan v. Dyson, 269 U.S. 49, 46 S. Ct. 55, 70 L. Ed. 159 (1925).

3 Caldwell v. Lyon, 168 Tenn. 607, 80 S.W.2d 80, 100 A.L.R. 1152 (1935).

4 In re Petition of Governor, 151 N.H. 1, 846 A.2d 1148 (2004).

Works.

46 Am. Jur. 2d Judges II Refs.

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

II. Qualification and Selection

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 3, 4, 5

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 3, 4, 5

End of Document

46 Am. Jur. 2d Judges § 5

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

II. Qualification and Selection

§ 5. Eligibility of person to be judge, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 3, 4, 5

The rules governing the selection and tenure of public officers, generally,[1] apply to judges in the absence of any provision to the contrary; requirements with respect to eligibility for the office of judge are usually prescribed by the constitution or statutes of the various states, and generally any person may be selected for the office who comes within the prescribed qualifications.[2] The Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard, regarding qualifications of judges, and thus most questions concerning a judge's qualifications to hear a case are not constitutional ones but, rather, are answered by common law, statute, or professional standards of bench and bar.[3] A statute prescribing additional qualifications to hold a judicial position is constitutional so long as it does not interfere with or nullify the constitutionally prescribed qualifications.[4] For example, the legislature may require that a judge take and pass an examination,[5] so long as such requirement is consistent with constitutional provisions.[6]

Intent, as a factor in determining if judges have complied with the constitutional requirement that they reside in the district from which they are elected, can be demonstrated in many ways, including but not limited to physical presence, and the Supreme Court considers physical presence to the extent that it manifests intent to reside in the district.[7]

Where a constitutional amendment prescribing additional qualifications to hold a judicial position is adopted by the electorate at the same time that a person is elected to judicial office, that person must, at the time the person is to take office, meet the qualifications required by the constitutional amendment; the fact that the person was eligible at the time the person's name was placed on the ballot does not make the person qualified to assume judicial office.[8]

Observation:

The Ex parte Young exception, which allowed federal suits to go forward against state officers for prospective equitable relief from ongoing violations of federal law despite the Eleventh Amendment jurisdictional bar, did not apply to a lawsuit brought by a justice of a state supreme court against other justices of the state supreme court claiming that the amendment of a rule governing the election of the chief justice unlawfully precluded the justice from attaining the position, since even though the old rule provided for the elevation of the vice-chief justice, the plaintiff had not been reelected to the position of vice-chief justice, and thus the prospective relief sought could not be provided by reinstating the old rule.[9]

CUMULATIVE SUPPLEMENT

Cases:

Judicial candidate who did not belong to political party had prudential standing to challenge provision of Delaware Constitution that limited service on state's supreme court, superior court, and chancery court to members of state's two major political parties, even though provision addressed matter of concern to many of state's residents, where there was no indication that candidate's reasons for why he was political independent and why he was interested in judicial position were not genuine. Del. Const. art. 4, § 3. Adams v. Governor of Delaware, 922 F.3d 166 (3d Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

[1] Am. Jur. 2d, Public Officers and Employees §§ 83 to 120.

[2] Chowning v. Magness, 792 S.W.2d 438 (Mo. Ct. App. S.D. 1990); State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989).
As to the various restrictions and limitations imposed upon judges once judicial office has been attained, see §§ 42 to 49.

[3] Bracy v. Gramley, 520 U.S. 899, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997).

[4] LaFever v. Ware, 211 Tenn. 393, 365 S.W.2d 44 (1963).
As to statutory or constitutional provisions requiring status as an attorney as a qualification to hold a judicial office, see § 6.

[5] Sinclair v. Schroeder, 225 Kan. 3, 586 P.2d 683 (1978).

[6] Clayton v. Kiffmeyer, 688 N.W.2d 117 (Minn. 2004).

[7] In re Conduct of Pendleton, 870 N.W.2d 367 (Minn. 2015).

[8] In re Advisory Opinion to the Governor, 192 So. 2d 757 (Fla. 1966).

[9] Opala v. Watt, 454 F.3d 1154 (10th Cir. 2006).

46 Am. Jur. 2d Judges § 6

American Jurisprudence, Second Edition | May 2021 Update

Judges
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II. Qualification and Selection

§ 6. Requirement that judge be attorney

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 3, 4, 5

A.L.R. Library

Constitutional restrictions on nonattorney acting as judge in criminal proceeding, 71 A.L.R.3d 562

Validity and construction of constitutional or statutory provision making legal knowledge or experience a condition of eligibility for judicial office, 71 A.L.R.3d 498

Forms

Forms relating to requirement that judge is an attorney, see Am. Jur. Pleading and Practice Forms, Judges [Westlaw®(r) Search Query]

Some jurisdictions have constitutional or statutory provisions to the effect that to be eligible for a judgeship, or to be a judge of a particular court, the person seeking the office must have been admitted to practice law in the courts of the state,[1] or must be, or have been for a specified period, engaged in the practice of law.[2] In the absence of any constitutional or statutory provision, a person is not required to be an attorney in order to be eligible for a judicial office.[3]

State constitutional provisions restricting candidacy for certain judicial offices to individuals admitted or entitled to be admitted to the practice of law in a state generally do not violate the civil rights of nonattorneys; the equal protection clause does not prevent a state from adopting more rigorous standards for insuring excellence in its judiciary than it adopts for other state elective offices, and the requirement that candidates be eligible to practice law in the state clearly advances the state's compelling need to obtain candidates who are qualified to understand and deal with the complexities of law.[4] Similarly,

statutes requiring judicial officers to be attorneys are generally constitutional, although in at least one jurisdiction a statute requiring a judge to be not only a licensed attorney but also a practicing attorney was found to be unconstitutional as making an unreasonable classification.[5] Statutory provisions requiring judges to be attorneys have been upheld where they except from the requirement justices of the peace in sparsely populated areas,[6] or where the requirement pertained to only one court of unusual jurisdiction.[7]

A candidate for judicial office was not required to attach a copy of the candidate's current attorney license to the affidavit of candidacy; although attaching a copy could fulfill the statutory requirement to provide the license, supplying, without attaching, a copy of the license also satisfied the plain language of the applicable statute.[8] Similarly, the automatic suspension of a judicial candidate's license to practice law due to the failure to timely pay an annual license fee did not render the candidate ineligible to be a candidate for a judicial race; the candidate was a licensed attorney of the state for at least six years immediately preceding the date the candidate would have assumed office because the candidate remained a licensed attorney during the period of the suspension, the candidate's license was not terminated,[9] and the candidate's name was not removed from the list of licensed attorneys.[10]

Eligibility with respect to legal experience or learning is determined as of the time of the election or appointment.[11]

Footnotes

1 Mitchell v. Shea, 80 Fed. Appx. 899 (5th Cir. 2003).

2 Sears v. Bayoud, 786 S.W.2d 248 (Tex. 1990).

3 City of Decatur v. Kushmer, 43 Ill. 2d 334, 253 N.E.2d 425 (1969).

4 Torjesen v. Smith, 114 Ill. App. 3d 147, 69 Ill. Dec. 813, 448 N.E.2d 273 (5th Dist. 1983).

5 LaFever v. Ware, 211 Tenn. 393, 365 S.W.2d 44 (1963).

6 In re Bartz, 47 Wash. 2d 161, 287 P.2d 119 (1955).
Statutory provisions classifying cities by population and permitting lay judges to preside in some cities while requiring law-trained judges in others does not deny equal protection of the laws to an accused facing possible confinement before a lay judge. North v. Russell, 427 U.S. 328, 96 S. Ct. 2709, 49 L. Ed. 2d 534 (1976).

7 Crawford v. Gilpatrick, 646 S.W.2d 433 (Tenn. 1983).

8 Moulton v. Simon, 883 N.W.2d 819 (Minn. 2016).

9 Chandler v. Martin ex rel. State, 2014 Ark. 219, 433 S.W.3d 884 (2014).

10 Kelly v. Martin ex rel. State, 2014 Ark. 217, 433 S.W.3d 896 (2014).

11 Gamble v. White, 566 So. 2d 171 (La. Ct. App. 2d Cir. 1990), writ denied, 565 So. 2d 923 (La. 1990).

End of Document

46 Am. Jur. 2d Judges § 7

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

II. Qualification and Selection

§ 7. Method of selection of judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 3, 4, 5

In the absence of constitutional restrictions, the legislature has the power to prescribe the method of selection of judges.[1] However, where the method of selection is prescribed by constitution, the legislature has no power to change it.[2] A statute granting a state judicial council authority to recommend the retention or nonretention of sitting judges in retention elections did not violate the state constitution; the section of the constitution requiring judges to be subject to approval or rejection on a nonpartisan ballot vested broad power in the legislature with regard to the council.[3] Also, the election of judges to a court of appeals and court of criminal appeals on a statewide basis is entirely consistent with the constitutional requirement that judges of those courts be elected only by the qualified voters of the district or circuit to which they are assigned; the intermediate appellate judges are each members of one, single, unified court, be it the court of appeals or the court of criminal appeals, that serves the entire state, and because they are not assigned to any district or circuit or grand division, they serve the entire state, notwithstanding the statutory limitation on judicial residence by grand division.[4]

Footnotes

1 Renaud v. State Court of Mediation and Arbitration, 124 Mich. 648, 83 N.W. 620 (1900).

2 State ex rel. Madden v. Crawford, 207 Or. 76, 295 P.2d 174 (1956).

3 Alaska Judicial Council v. Kruse, 331 P.3d 375 (Alaska 2014).

4 Hooker v. Haslam, 437 S.W.3d 409 (Tenn. 2014).

46 Am. Jur. 2d Judges § 8

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

II. Qualification and Selection

§ 8. Method of selection of judge—Election

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 3, 4, 5

Forms

Forms relating to elections for judges, generally, see Am. Jur. Legal Forms 2d, Judges [Westlaw®(r) Search Query]

In some states, judges are elected by the vote of the people[1] on nonpartisan ballots.[2] Within constitutional limits, the legislature generally may prescribe the time and manner of conducting elections for judges.[3] Thus, it is sometimes provided by constitution that judges must be elected by the qualified voters of the district or circuit to which they are to be assigned.[4] A statute may also provide for the postponement of elections for judge in cases where the office was vacated between the last date to file nomination documents and the primary election date.[5] However, the Secretary of State was required to place an appointed judge on the general election ballot, after that judge replaced a district court judge who resigned after the primary election but more than 56 days prior to the general election, where the vacancy was an office required by the state constitution to be filled at the next general election, and 60 days prior to the general election, the State Central Committee of the Republican Party wrote to the Secretary of State nominating the appointed judge to be placed on the general election ballot.[6] With respect to a putative candidate's designating petition, seeking to be designated as a political party's candidate for position as family court judge in a primary election, validating two signature sheets that the elections board invalidated because witness statements were printed on separate sheets that were stapled to signature sheets was warranted based on substantial compliance with the statutory requirements.[7]

The legislature may require a candidate for judicial office to pay a qualifying fee so long as it is not palpably arbitrary and unreasonable.[8]

Observation:

States have a vital interest in safeguarding public confidence in the fairness and integrity of elected judges; the judiciary's authority depends in large measure on the public's willingness to respect and follow its decisions.[9] A state's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections, and states may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians.[10]

Attorneys who are judicial candidates must comply with the state code of judicial conduct regulating campaign conduct of candidates for judicial office.[11] However, rules or regulations which prohibit judicial candidates from announcing their views on "disputed political or legal issues" during a campaign may be found to be in violation of the First Amendment.[12]

A judge's activities with respect to the expenditure of funds by a political party to air a television commercial prepared by the judge in connection with a reelection campaign did not rise to the level of active involvement or interaction in consultation, cooperation, or coordination needed to render the party's expenditure an in-kind contribution, within the scope of the applicable canon of judicial conduct; although the judge participated in the decision to create the advertisement at issue, the judge had no involvement in the party's decision to air that ad, and the party contacted the state supreme court regarding the advertising and acted on information thus obtained, excluding the judge from decision-making.[13] An "in-kind contribution" within the scope of the canon of the code of judicial conduct governing campaign expenditures must be made with the consent, coordination, cooperation, or consultation of the judicial candidate or the candidate's agent, or at the request or suggestion of the judicial candidate or agent of that candidate; there can be no such expenditure absent a meeting of the minds, including informal or de facto arrangements, with respect to the intended advertising, with an agreement being an essential component of such an expenditure.[14] A judicial campaign expenditure "made with the consent of, in coordination, cooperation, or consultation with, or at the request or suggestion of a judicial candidate, [or] the campaign committee or agent of the judicial candidate" refers to one made with more than mere knowledge or passive participation on the part of the candidate and occurs when the candidate engages in substantial discussion or negotiation with the political party regarding the contents, timing, type, or frequency of the communication or when the candidate has the ability to direct or control the political party's expenditure in a meaningful way, such that the candidate and the political party engage in a joint venture.[15] The determination as to whether a particular expenditure in a judicial campaign constitutes an "in-kind contribution" must be made on a case-by-case basis after a consideration of the totality of the circumstances.[16] For instance, when a judicial candidate requests, suggests, directs, or exercises some degree of control over a political party's expenditure on behalf of the candidate's campaign or engages in substantial discussion or negotiation with the political party regarding the content, timing, type, or frequency of the advertising, the expenditure becomes an in-kind contribution to the candidate's campaign committee.[17]

Footnotes

1 Brady v. Cortes, 873 A.2d 795 (Pa. Commw. Ct. 2005), order aff'd, 582 Pa. 423, 872 A.2d 170 (2005) and (disapproved of on other grounds by, Otter v. Cortes, 602 Pa. 516, 980 A.2d 1283 (2009)).

2 Evans v. State Election Bd. of State of Okl., 1990 OK 132, 804 P.2d 1125 (Okla. 1990).

3 Winston v. Moore, 244 Pa. 447, 91 A. 520 (1914).

4 McCulley v. State (State Report Title: The Judges' Cases), 102 Tenn. 509, 53 S.W. 134 (1899).

5 Cathey v. Weissburd, 202 Cal. App. 3d 982, 249 Cal. Rptr. 204 (2d Dist. 1988).

6 Hand v. Winter, 2017-NMSC-005, 388 P.3d 651 (N.M. 2016).

7 Sheldon v. Bjork, 142 A.D.3d 763, 36 N.Y.S.3d 768 (4th Dep't 2016).

[8] White v. Stanley, 707 S.W.2d 883 (Tex. 1986).

[9] Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015).

[10] Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015).

[11] In re Shanley, 98 N.Y.2d 310, 746 N.Y.S.2d 670, 774 N.E.2d 735 (2002).
A candidate for judicial office should not personally solicit or accept campaign funds; such actions violate the Judicial Code of Ethics; however, a committee established by a judicial candidate, including an incumbent judge, may solicit or accept funds for such candidate's campaign. Matter of Karr, 182 W. Va. 221, 387 S.E.2d 126 (1989).

[12] American Civil Liberties Union of Florida, Inc. v. The Florida Bar, 744 F. Supp. 1094 (N.D. Fla. 1990).
As to the prohibition against political activity by judges once elected to office, see § 45.

[13] Disciplinary Counsel v. Spicer, 106 Ohio St. 3d 247, 2005-Ohio-4788, 834 N.E.2d 332 (2005).

[14] Disciplinary Counsel v. Spicer, 106 Ohio St. 3d 247, 2005-Ohio-4788, 834 N.E.2d 332 (2005).

[15] Disciplinary Counsel v. Spicer, 106 Ohio St. 3d 247, 2005-Ohio-4788, 834 N.E.2d 332 (2005).

[16] Disciplinary Counsel v. Spicer, 106 Ohio St. 3d 247, 2005-Ohio-4788, 834 N.E.2d 332 (2005).

[17] Disciplinary Counsel v. Spicer, 106 Ohio St. 3d 247, 2005-Ohio-4788, 834 N.E.2d 332 (2005).

End of Document

46 Am. Jur. 2d Judges § 9

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

II. Qualification and Selection

§ 9. Method of selection of judge—Appointment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 3, 4, 5

Forms

Forms relating to appointment, see Am. Jur. Legal Forms 2d, Judges [Westlaw®(r) Search Query]

There is no federal constitutional or statutory principle that requires that state judges be elected rather than appointed.[1] In some states, judges are appointed by the governor[2] or by the legislature.[3] Judges generally may not be appointed by other judges.[4]

The Federal Constitution provides that federal judges must be appointed by the President of the United States by and with the advice and consent of the Senate.[5] The President has the power to appoint judges during a recess of the Senate and may exercise the power even if the vacancy occurred while the Senate was in session[6] or during an intrasession break, even when the vacancy occurred prior to the break.[7]

Practice Tip:

In the absence of statute, a person who has no interest other than as a citizen and a member of the bar of a court may not question the validity of the appointment of a judge.[8]

CUMULATIVE SUPPLEMENT

Cases:

Administrative law judges (ALJ) of Securities and Exchange Commission (SEC), to whom SEC could delegate the task of presiding over enforcement proceedings, were "Officers of the United States," within meaning of Appointments Clause; ALJs had career appointments to a continuing office established by law, and they exercised significant discretion in carrying out important functions, with all the authority needed to ensure fair and orderly adversarial hearings, and nearly all the tools of federal trial judges. U.S.C.A. Const. Art. 2, § 2, cl. 2; 5 U.S.C.A. §§ 556, 557, 3105, 5372; 15 U.S.C.A. § 78d–1(a); 5 C.F.R. § 930.204(a); 17 C.F.R. §§ 200.14(a), 201.110, 201.111. Lucia v. S.E.C., 138 S. Ct. 2044 (2018).

[END OF SUPPLEMENT]

Footnotes

[1] Pocker v. Brown, 819 F.2d 148 (6th Cir. 1987).

[2] State v. Wilson, 545 A.2d 1178 (Del. 1988).
As to the appointment of judges in occupied territory, see Am. Jur. 2d, War § 121.

[3] Murphy v. City of Mobile, 504 So. 2d 243 (Ala. 1987); State v. Clark, 87 Conn. 537, 89 A. 172 (1913).

[4] Ohio State Bar Assn. v. Shattuck, 85 Ohio St. 3d 334, 1999-Ohio-271, 708 N.E.2d 199 (1999).

[5] U.S. Const. Art. II, § 2.
As to appointment of federal judges, generally, see Am. Jur. 2d, Federal Courts §§ 19 to 23.

[6] U. S. v. Allocco, 305 F.2d 704 (2d Cir. 1962).

[7] Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004).

[8] Ex parte Levitt, 302 U.S. 633, 58 S. Ct. 1, 82 L. Ed. 493 (1937).

46 Am. Jur. 2d Judges § 10

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

II. Qualification and Selection

§ 10. Oath of judge; bond

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 3, 4, 5

Forms

Forms relating to oath or bond, generally, see Am. Jur. Legal Forms 2d, Judges [Westlaw®(r) Search Query]

Before entering on the duties of the position, an appointed or elected judge is usually required to take an oath of office,[1] and this requirement generally applies to special judges.[2] A special oath is prescribed for federal judges,[3] and the judges of state courts are required by federal statute to take an oath to support the Constitution of the United States.[4] While members of a state supreme court take an oath to uphold the United States Constitution, the members also take an oath to uphold the state constitution, which is the enduring expression of the will of "we, the people" of the state.[5]

A failure to file an oath of office does not necessarily, by itself, deprive a judge of the authority to act.[6] Similarly, the failure to post a bond does not necessarily provide a basis for forfeiture of office.[7] On the other hand, a nominee's unilateral act of reciting the oath of office for associate justice before persons qualified to administer oaths did not transform the situation and somehow create a valid appointment where there was none; the Governor made no appointment, thus, no valid commission could issue, and the purported taking of the oath was an empty gesture.[8]

Footnotes

1 City of Crossett v. Switzer, 302 Ark. 239, 788 S.W.2d 738 (1990); Adams v. State, 214 Ind. 603, 17 N.E.2d 84, 118 A.L.R. 1095 (1938).

2 § 235.

[3] Am. Jur. 2d, Federal Courts § 25.

[4] 4 U.S.C.A. §§ 101, 102.

[5] People v. Tanner, 496 Mich. 199, 853 N.W.2d 653 (2014).

[6] Espinosa v. State, 115 S.W.3d 64 (Tex. App. San Antonio 2003).

[7] Vos v. Village of Washingtonville, 2004-Ohio-1388, 2004 WL 549818 (Ohio Ct. App. 7th Dist. Columbiana County 2004).

[8] McCarthy v. Governor, 471 Mass. 1008, 27 N.E.3d 828 (2015).

End of Document

46 Am. Jur. 2d Judges III Refs.

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

III. Term of Office, in General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 7, 9

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 7, 9

End of Document

46 Am. Jur. 2d Judges § 11

American Jurisprudence, Second Edition | May 2021 Update

Judges
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III. Term of Office, in General

§ 11. Term of office of judge, generally

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Judges 7, 9

Judges are usually elected or appointed for a term of years.[1]

The Federal Constitution provides that the Judges of the Supreme Court and of inferior federal courts will hold their offices during good behavior.[2]

A constitutional amendment may change the term of an incumbent judge; however, the terms of office of judicial positions may not be changed by a constitutional amendment that is not self-executing, that does not supersede the preexisting constitutional provision by an express repeal, and that does not clearly express the intent that the change in the term be made immediately.[3]

In the absence of constitutional authority, if the term of a judge is fixed by the constitution, the legislature cannot extend or diminish it[4] by providing that judges will serve for the term so fixed and until their successors are duly appointed and qualified.[5] Similarly, in exercising the executive power of appointment, a governor does not have discretion regarding the length of an appointed judge's term and the date of the expiration of that term where such matters are explicitly prescribed by the state constitution.[6]

Footnotes

1 Draughn v. Brown, 651 S.W.2d 728 (Tex. 1983).
As to the duration of the term of a judge chosen to fill a vacancy, see § 225.

2 U.S. Const. Art. III, § 1.

3 State ex rel. Cotter v. Leipner, 138 Conn. 153, 83 A.2d 169 (1951).

4 State ex rel. Rundbaken v. Watrous, 135 Conn. 638, 68 A.2d 289 (1949).

[5] § 12.

[6] Sprague v. Casey, 520 Pa. 38, 550 A.2d 184 (1988).

End of Document

46 Am. Jur. 2d Judges § 12

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

III. Term of Office, in General

§ 12. Holding over of judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 7, 9

Forms

Forms relating to holding over, generally, see Am. Jur. Pleading and Practice Forms, Judges [Westlaw®(r) Search Query]

Constitutions or statutes frequently provide that judges will hold office until their successors are elected or appointed and qualified.[1] Even in the absence of a statutory provision, an incumbent judge may have the right and duty to hold over and exercise the duties and functions of the office until a successor is appointed; however, under such circumstances the judge is not a judge de jure, but is at most a judge de facto.[2] A judge de facto merely performs the functions of the office until a duly qualified appointee appears, and then is bound to yield the office to the appointee; a judge de facto's incumbency does not prevent a vacancy of the office or the filling of the vacancy.[3]

Where the constitution or statute fixes the term of a judge at a certain number of years, a statutory provision to the effect that public officers may hold over until a successor is chosen does not apply to judicial officers.[4] Under such a statute, a judge does not hold over but ceases to hold office as of right at the conclusion of the specified number of years.[5]

Observation:

Under a statute providing that judges will serve for a specified term from the date of appointment and until a successor is appointed and qualified, the appointing authority cannot appoint a judge holding over from a previous term of appointment to the statutory term beginning at the termination of the prior term, but must appoint the judge for the statutory term from the date of the appointment.[6]

Footnotes

[1] Gray v. Bryant, 125 So. 2d 846 (Fla. 1960).

[2] State v. Clark, 87 Conn. 537, 89 A. 172 (1913).
A judge whose term has ceased may sign orders nunc pro tunc for a judgment entered into before the expiration of that judge's term. Lansing v. Lansing, 736 S.W.2d 554 (Mo. Ct. App. E.D. 1987).
A district judge who has been properly replaced by a successor has the authority to sign a written judgment after the judge has been replaced, provided that such judge heard the cause and entered the judgment in the docket sheet before the expiration of the term. Martinez v. Martinez, 759 S.W.2d 522 (Tex. App. San Antonio 1988).

[3] Nollette v. Christianson, 115 Wash. 2d 594, 800 P.2d 359 (1990).
As to de facto judges, generally, see § 226.

[4] Etelson v. Jacaruso, 80 Misc. 2d 685, 364 N.Y.S.2d 103 (Sup 1975), judgment aff'd, 47 A.D.2d 715, 366 N.Y.S.2d 389 (2d Dep't 1975).

[5] State ex rel. Rundbaken v. Watrous, 135 Conn. 638, 68 A.2d 289 (1949).

[6] Levine v. Mayor of City of Passaic, 233 N.J. Super. 559, 559 A.2d 485 (Law Div. 1988).

End of Document

46 Am. Jur. 2d Judges IV A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IV. Termination or Suspension of Office; Censure

A. Termination, Resignation, or Retirement

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 10

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 10

End of Document

46 Am. Jur. 2d Judges § 13

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IV. Termination or Suspension of Office; Censure

A. Termination, Resignation, or Retirement

§ 13. Termination of judge's office, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 10

Forms

Forms relating to termination, resignation or retirement, generally, see Am. Jur. Legal Forms 2d, Judges [Westlaw®(r) Search Query]

The term of a judge may be terminated, or the judge may cease to hold office, among other ways, by resignation, expiration of the term of office,[1] reaching the age of mandatory retirement as specified by statute or constitutional provision,[2] or the acceptance of an incompatible office.[3] Some jurisdictions also provide for the recall of judges by the electorate.[4]

A judge may cease to hold office by resigning.[5] There is authority supporting the view that a judge does not have the absolute right at the judge's own pleasure to abandon duties and resign the office, that an acceptance of a resignation, or its equivalent, may be necessary to perfect it, and that when an acceptance specifies the time at which it will take effect, until such time the resignation is not complete.[6] Once a judge's resignation is written, signed, and delivered to the appropriate authority, that authority has no discretion but to accept the resignation.[7] There is authority for the view that the resignation of a county judge, submitted to the governor to become operative on a specified date, may become operative on that date, even though, before that date and before the governor has acted on it, the judge attempts to withdraw the resignation.[8] A judge may still continue to serve on a court from which the judge has resigned until the effective date of the resignation, even though the judge has taken an oath of office to be judge of another court a few days prior to the beginning of that term.[9] A trial judge who conducted an evidentiary hearing on a divorcing wife's motion for temporary alimony had no authority to sign an order awarding temporary alimony, and thus the temporary alimony order signed by the judge was void and of no legal effect, where the order was signed after the effective date of the judge's resignation from the bench.[10] A judge's voluntary retirement is sufficient to render misconduct charges and related issues moot, warranting dismissal of a complaint.[11] On the other hand, the retired status of a judge does not deprive the Judicial Qualifications Commission of its jurisdiction so long as a complaint

is filed within one year after retirement,[12] and does not deprive a state supreme court of disciplinary jurisdiction.[13]

Statutes may provide for the resignation or retirement of judges under certain conditions; for example, Congress has made such a provision in the case of federal judges.[14]

Footnotes

1 Todd v. Bradley, 97 Conn. 563, 117 A. 808, 25 A.L.R. 22 (1922).

2 § 14.

3 §§ 43, 44.

4 Am. Jur. 2d, Public Officers and Employees §§ 200 to 212.

5 Todd v. Bradley, 97 Conn. 563, 117 A. 808, 25 A.L.R. 22 (1922).

6 In re Dempsey, 101 Ill. Dec. 58, 498 N.E.2d 240 (Ill. 1986).

7 Texas Democratic Executive Committee v. Rains, 756 S.W.2d 306 (Tex. 1988).

8 People ex rel. Adamowski v. Kerner, 19 Ill. 2d 506, 167 N.E.2d 555, 82 A.L.R.2d 740 (1960).

9 Carey Canada, Inc. v. Hinely, 181 Ga. App. 364, 352 S.E.2d 398 (1986), judgment rev'd on other grounds, 257 Ga. 150, 356 S.E.2d 202 (1987).

10 Triola v. Triola, 299 Ga. 220, 787 S.E.2d 206 (2016).

11 In re Charge of Judicial Misconduct, 91 F.3d 90 (9th Cir. Jud. Council 1996).

12 In re Downey, 937 So. 2d 643 (Fla. 2006).

13 In re Downey, 937 So. 2d 643 (Fla. 2006).

14 Am. Jur. 2d, Federal Courts §§ 103 to 109.

End of Document

46 Am. Jur. 2d Judges § 14

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IV. Termination or Suspension of Office; Censure

A. Termination, Resignation, or Retirement

§ 14. Mandatory retirement provisions for judges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 10

A.L.R. Library

Who is exempt from definition of "employee," under sec. 11(f) of Age Discrimination in Employment Act (ADEA) (29 U.S.C.A. sec. 630(f)), so as to be excepted from coverage of Act, 110 A.L.R. Fed. 490

State constitutional provisions which require retirement of state judges upon reaching a specified age are constitutional.[1] Thus, a constitutional amendment approved by the people pursuant to their inherent and indefeasible right to amend the constitution as they saw fit, which set the mandatory retirement age at 70 for judges, after which, subject to necessity and approval, judges could be assigned to serve as senior judges, did not violate equal protection under the state constitution, but was rationally related to the interests of the people in bringing in younger judges while retaining the services of willing and able retired judges, in permitting the orderly attrition of judges, in promoting the advancement of general considerations of judicial efficiency, and in insuring the fitness of the judiciary as a whole.[2]

The Age Discrimination in Employment Act (ADEA),[3] which prohibits arbitrary age discrimination in employment, exempts from its coverage persons "elected to public office,"[4] and elected state court judges are considered persons "elected to public office" under the ADEA.[5] Thus, state statutory or constitutional provisions, as applied to elected judges, requiring state court judges to retire upon reaching a specified age will withstand ADEA challenges.[6] Appointed state court judges are within the exception for "appointees on the policymaking level" and are not covered by the protections of the ADEA.[7]

Footnotes

[1] Zielasko v. State of Ohio, 873 F.2d 957 (6th Cir. 1989); Martin v. State, 330 N.C. 412, 410 S.E.2d 474 (1991).

[2] Driscoll v. Corbett, 620 Pa. 494, 69 A.3d 197 (2013).

[3] 29 U.S.C.A. §§ 621 to 634.

[4] 29 U.S.C.A. § 630(f).

[5] Gondelman v. Com., 120 Pa. Commw. 624, 550 A.2d 814 (1988).

[6] Diamond v. Cuomo, 70 N.Y.2d 338, 520 N.Y.S.2d 732, 514 N.E.2d 1356 (1987).

[7] Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991).

End of Document

46 Am. Jur. 2d Judges § 15

American Jurisprudence, Second Edition | May 2021 Update

Judges

Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IV. Termination or Suspension of Office; Censure

A. Termination, Resignation, or Retirement

§ 15. Judicial activities of judges following resignation or retirement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 10

Some states have statutory or constitutional provisions by which retired judges may be assigned to sit as judges.[1] A judge who has retired does not have a constitutional due process right to a judicial review of a determination not to reinstate such judge to judicial duties, since such a determination does not affect a property right.[2] A judge who resigns or retires from a court after hearing a matter may be allowed to participate fully in consideration of the case subsequent to the judge's retirement.[3]

Footnotes

1 In re National Recreation Products, Inc., 403 F. Supp. 1399 (C.D. Cal. 1975).

2 Marro v. Bartlett, 61 A.D.2d 729, 403 N.Y.S.2d 924 (3d Dep't 1978), judgment aff'd, 46 N.Y.2d 674, 416 N.Y.S.2d 212, 389 N.E.2d 808 (1979).

3 Wolfe v. Yudichak, 153 Vt. 235, 571 A.2d 592, 59 Ed. Law Rep. 133 (1989).

End of Document

46 Am. Jur. 2d Judges IV B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IV. Termination or Suspension of Office; Censure

B. Impeachment and Removal

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 11

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 11

End of Document

46 Am. Jur. 2d Judges § 16

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IV. Termination or Suspension of Office; Censure

B. Impeachment and Removal

§ 16. Removal of judge from office, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 11

A.L.R. Library

Consorting with, or maintaining social relations with, criminal figure as ground for disciplinary action against judge, 15 A.L.R.5th 923

Confidentiality of proceedings or reports of judicial inquiry board or commission, 5 A.L.R.4th 730

Forms

Forms relating to removal, generally, see Am. Jur. Pleading and Practice Forms, Judges [Westlaw®(r) Search Query]

Generally, any power existing in a state court to remove a state judge from office must be based upon express constitutional provisions or upon valid statutory enabling provisions enacted thereunder.[1] The method by which judges may be removed, and the grounds for their removal, are also generally fixed by state constitutions and statutes.[2] Where the constitution prescribes the method of removal, the legislature has no power to provide for a removal in any other way.[3]

Judges are "public officers" for purposes of a state constitution's voter recall provision.[4] However, a state constitutional provision, which states that a judge may be censured, retired, removed, or otherwise disciplined by the Commission on Judicial Discipline, is the exclusive means of judicial removal, except for legislative impeachment, where the provision repealed voter recall of judicial officers as allowed in an earlier-enacted constitutional provision.[5]

United States judges, including district judges, are subject to removal only by the Senate of the United States sitting as a court of impeachment.[6] Judges of inferior courts may be removed by courts of general jurisdiction,[7] which may delegate the task to a disciplinary commission.[8] However, a court does not have the power to remove a judge from office where neither the state constitution nor statutes confer on it disciplinary authority over acting judges.[9]

Observation:

In the absence of a specific constitutional or statutory authorization, under its general power of superintendence, a state supreme court may exercise its administrative authority to conduct an inquiry and take such action as is deemed necessary, short of removal of a judge from office.[10] Actual levels of discipline to be imposed by the court for judicial misconduct are, in the end, institutional and collective judgment calls; they rest on the court's assessment of the individual facts of each case, as measured against the Code and Rules of Judicial Conduct and the prior precedents of the court.[11] The Judicial Standards Commission's recommendations are not binding upon the state supreme court in judicial disciplinary cases, and thus the court exercises its independent judgment with respect to the disciplinary measures to be imposed.[12] In reviewing the Judicial Standards Commission's recommendations regarding judicial disciplinary matters, the state supreme court acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court.[13]

CUMULATIVE SUPPLEMENT

Cases:

Commission on Judicial Fitness and Disability lacked authority to reinvestigate judge's conduct towards officials at his son's soccer games, which conduct had formed basis for previous complaint that had been dismissed by Commission; new information on which Commission relied to reinvestigate consisted solely of Commission's own unfavorable assessment of judge's credibility in connection with separate and unrelated incident that occurred more than a year later, which information not bolstered by any new facts about what actually occurred at soccer games, conduct at issue was not of significantly serious nature, and Commission did not commence reinvestigation until almost two years after dismissing original initiating complaint. Or. Rev. Stat. §§ 1.415(3), 1.420(1). Day, 362 Or. 547, 413 P.3d 907 (2018).

[END OF SUPPLEMENT]

Footnotes

1 In re Municipal Court of City of Cedar Rapids, 188 N.W.2d 354 (Iowa 1971).

2 In re Hapner, 737 So. 2d 1075 (Fla. 1999).
Only the legislature has the power to remove a family court judge from office, and it may do so only by impeachment. In re Watkins, 233 W. Va. 170, 757 S.E.2d 594 (2013).
The legislature cannot delegate the power to remove a judge to the executive or the judicial branches of government. In re Murphy, 726 S.W.2d 509 (Tenn. 1987).
As to grounds for the removal of judges, see § 19.
As to the recall of public officers by the electorate, generally, see Am. Jur. 2d, Public Officers and Employees §§ 200 to 212.

3 Cusack v. Howlett, 44 Ill. 2d 233, 254 N.E.2d 506 (1969).

4 Ramsey v. City of North Las Vegas, 392 P.3d 614 (Nev. 2017).

5 Ramsey v. City of North Las Vegas, 392 P.3d 614 (Nev. 2017).

6 Am. Jur. 2d, Federal Courts § 19.

7 In re Gillard, 271 N.W.2d 785 (Minn. 1978).

8 In re Terry, 262 Ind. 667, 323 N.E.2d 192 (1975).

9 In re Watson, 71 Nev. 227, 286 P.2d 254, 53 A.L.R.2d 301 (1955).

10 Goldman v. Bryan, 104 Nev. 644, 764 P.2d 1296 (1988).

11 Matter of Duckman, 92 N.Y.2d 141, 677 N.Y.S.2d 248, 699 N.E.2d 872 (1998).

12 In re Badgett, 362 N.C. 202, 657 S.E.2d 346 (2008).

13 In re Badgett, 362 N.C. 202, 657 S.E.2d 346 (2008).

End of Document

46 Am. Jur. 2d Judges § 17

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IV. Termination or Suspension of Office; Censure

B. Impeachment and Removal

§ 17. Nature of proceedings to remove judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 11

Before a judge may be adjudged to have forfeited the office or become disqualified from holding future office, the judge's guilt must have been adjudicated at least in a formal proceeding wherein the judge was accorded due process of law; conviction in a criminal proceeding is not necessarily required.[1] The combination of investigative and adjudicatory functions in one body during such a proceeding does not constitute a violation of due process.[2]

Although the constitutional remedy by impeachment does not prevent a subsequent indictment and conviction, and does not extend beyond a removal from office and a disqualification to hold office during the term for which the officer was elected or appointed, due process requires that a judge not be permanently enjoined from seeking another judgeship in the future.[3]

The purpose of judicial discipline is to maintain the honor and dignity of the judiciary and the proper administration of justice rather than to punish the individual.[4] The purpose of judicial disciplinary proceedings is the preservation and enhancement of public confidence in the honor, integrity, dignity, and efficiency of the members of the judiciary and the system of justice.[5] Because the purpose of judicial discipline proceedings is to protect the public,[6] rather than to punish the individual judge,[7] the proceeding is neither civil nor criminal but sui generis.[8]

Charges against a judge need not be established by proof beyond a reasonable doubt, but rather by a preponderance of the evidence[9] or by clear and convincing evidence.[10] For instance, a cognizable misconduct complaint, based on allegations of a judge not following prevailing law or the directions of a court of appeals in particular cases must identify clear and convincing evidence of willfulness, that is, clear and convincing evidence of a judge's arbitrary and intentional departure from prevailing law based on the judge's disagreement with, or willful indifference to, that law.[11] Before reporting findings of fact to the supreme court, the Judicial Qualifications Commission (JQC) must conclude that they are established by clear and convincing evidence; the supreme court must then review the findings and determine whether they meet this quantum of proof, a standard which requires more proof than a "preponderance of the evidence" but less than "beyond and to the exclusion of a reasonable doubt."[12] Findings in proceedings before the JQC that meet the "clear and convincing evidence" standard are given great weight by the supreme court.[13]

CUMULATIVE SUPPLEMENT

Cases:

Neither the Judicial Standards Commission's findings of fact nor its conclusions of law are binding, but they may be adopted by the Supreme Court in a judicial disciplinary proceeding; if the Commission's findings are adequately supported by clear and convincing evidence, the Court must determine whether those findings support the Commission's conclusions of law. In re Inquiry Concerning a Judge, No. 17-143, 827 S.E.2d 516 (N.C. 2019).

[END OF SUPPLEMENT]

Footnotes

1 In re Inquiry Concerning Holien, 612 N.W.2d 789 (Iowa 2000).
As to the determination and hearing required for disqualification of a judge in particular cases, see §§ 188 to 197.

2 In re Elliston, 789 S.W.2d 469 (Mo. 1990).

3 Matter of Probert, 411 Mich. 210, 308 N.W.2d 773 (1981).

4 Matter of Henderson, 392 P.3d 56 (Kan. 2017).

5 Matter of Callaghan, 238 W. Va. 495, 796 S.E.2d 604 (2017), petition for certiorari filed (U.S. July 10, 2017).

6 In re Neely, 2017 WY 25, 390 P.3d 728 (Wyo. 2017), petition for certiorari filed (U.S. Aug. 4, 2017).

7 Re Decker, 212 So. 3d 291 (Fla. 2017); In re Dean, 855 N.W.2d 186 (Iowa 2014), as amended (Dec. 11, 2014); In re McCree, 495 Mich. 51, 845 N.W.2d 458 (2014); In re Balivet, 196 Vt. 425, 2014 VT 41, 98 A.3d 794 (2014).

8 In re Conduct of Pendleton, 870 N.W.2d 367 (Minn. 2015).

9 In re Noecker, 472 Mich. 1, 691 N.W.2d 440 (2005).

10 In re Doggett, 874 So. 2d 805 (La. 2004).

11 In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 558 (U.S. Jud. Conf. 2008).

12 In re Allen, 998 So. 2d 557 (Fla. 2008).

13 In re Henson, 913 So. 2d 579 (Fla. 2005).

46 Am. Jur. 2d Judges § 18

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IV. Termination or Suspension of Office; Censure

B. Impeachment and Removal

§ 18. Nature of proceedings to remove judge—Confidentiality

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 11

A.L.R. Library

Confidentiality of proceedings or reports of judicial inquiry board or commission, 5 A.L.R.4th 730

Proceedings relating to the investigation of alleged judicial misconduct are generally required by state constitution or statute to be kept confidential.[1] However, provisions in some jurisdictions permit public disclosure of judicial investigation procedures in certain specified instances.[2] In addition, although a state constitution required that a judicial inquiry board investigating charges of judicial misconduct maintain the confidentiality of all its proceedings, where the judge under investigation for alleged criminal conduct had sought a court order directing that the board's investigatory files be made available for inspection and in order to obtain disclosure the judge was required to show a compelling and particularized need, due process required the board to disclose evidence and material which it had collected in the investigation, to the extent that such evidence and material plainly negated on its face the judge's guilt.[3]

The confidentiality of hearings before an investigative panel of a Judicial Qualifications Commission is aimed at protecting judges from unsubstantiated claims, not meritorious claims that advance to a hearing panel.[4]

Footnotes

[1] Johnson Newspaper Corp. v. Melino, 151 A.D.2d 214, 547 N.Y.S.2d 915 (3d Dep't 1989), order aff'd, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.2d 1046 (1990).

[2] In re Angel, 867 So. 2d 379 (Fla. 2004).

[3] People ex rel. Illinois Judicial Inquiry Bd. v. Hartel, 72 Ill. 2d 225, 20 Ill. Dec. 592, 380 N.E.2d 801, 5 A.L.R.4th 712 (1978).

[4] In re Eriksson, 36 So. 3d 580 (Fla. 2010).

End of Document

46 Am. Jur. 2d Judges § 19

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IV. Termination or Suspension of Office; Censure

B. Impeachment and Removal

§ 19. Grounds for removal of judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 11

A.L.R. Library

Consorting with, or maintaining social relations with, criminal figure as ground for disciplinary action against judge, 15 A.L.R.5th 923

What constitutes conviction within statutory or constitutional provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139

Disciplinary action against judge on ground of abusive or intemperate language or conduct toward attorneys, court personnel, or parties to or witnesses in actions, and the like, 89 A.L.R.4th 278

Removal or discipline of state judge for neglect of, or failure to perform, judicial duties, 87 A.L.R.4th 727

Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness, 82 A.L.R.4th 567

Sexual misconduct as ground for disciplining attorney or judge, 43 A.L.R.4th 1062

First Amendment protection for judges or government attorneys subjected to discharge, transfer, or discipline because of speech, 108 A.L.R. Fed. 117

Forms

Forms relating to grounds for removal, generally, see Am. Jur. Pleading and Practice Forms, Judges [Westlaw®(r) Search Query]

Grounds for removal of a judge from office are usually prescribed by the constitutions or statutes of the various states,[1] or by the applicable state codes of judicial conduct.[2] Among the common grounds for removal of a judge from office are willful neglect of duty,[3] corruption in office,[4] intemperance to such an extent as makes the judge unfit for the discharge of official duties,[5] incompetency,[6] misconduct,[7] violations of a judicial canon requiring that judges avoid impropriety and the appearance of impropriety,[8] or the commission of any offense involving moral turpitude while in office or under color of office.[9]

A judge's actions which are a result of a mistaken, but honest, interpretation of the law and judicial authority does not violate the obligation to be faithful to the law and maintain professional competence in it,[10] but action made contrary to clear and determined law about which there is no confusion or question as to its interpretation and where the complained-of legal error is egregious, made as part of a pattern or practice of legal error, or made in bad faith, will constitute misconduct.[11] An objective standard for determining when reversible legal error constitutes judicial misconduct under the code of judicial conduct shields from disciplinary action legal error that is reversible on appeal where the law had not been clear prior to the judge's determination or where the judge engaged in simple abuse of authority or mistake of law; on the other hand, if error in following the law were willful, it could fall into either the egregious or bad faith categories, particularly if it impacted fundamental rights clearly and unmistakably known to every competent jurist such that their violation brings the judicial process into public disrepute.[12]

Some state statutes or constitutions provide for the removal of judges found guilty of willful misconduct; under such statutes, bad faith may[13] or may not be a necessary element of such misconduct.[14] For purposes of a judicial disciplinary proceeding, willful misconduct in office is the improper or wrong use of power of the judicial office by a judge acting intentionally or with gross unconcern for such conduct and generally in bad faith.[15]

Acts of misconduct in office are a ground for removal of a judge, although such acts occurred during a previous term of office.[16] A judge should not be able to avoid discipline by simply resigning or voluntarily leaving office.[17] A judge may even be removed for misconduct stemming from acts committed by the judge before the party took office;[18] however, there is also authority to the contrary.[19]

CUMULATIVE SUPPLEMENT

Cases:

Judicial candidate's bias against criminal defendants and criminal defense attorneys, and in favor of victims via social media statements pointed to future misconduct, and thus sanction of removal was warranted; candidate did not fully accept responsibility for her actions, and bias was sufficient to create fear on the behalf of criminal defendants that they would not receive a fair trial or hearing. West's F.S.A. Code of Jud.Conduct, Canon 7A; Fla. Bar Rule 4-8.2. Re Santino, 257 So. 3d 25 (Fla. 2018).

Judicial disciplinary commission evaluating alleged pattern of uncooperative and unseemly behavior of judge who was serving her second 10-year term could consider actions that took place in judge's first term, despite her claim that allegations of misconduct were not brought to attention of state governor when she was reappointed and confirmed for her second term as judge, since conduct reflected a larger pattern of misconduct occurring over both terms, and, under rules, any judge could be sanctioned for his or her conduct so long as the judge remained in office. Md.Rule 18-407. Matter of Russell, 464 Md. 390, 211 A.3d 426 (2019).

Judge's conduct in rescinding an arrest warrant signed by another judge in a matter in which judge was a party constituted willful misconduct and violated the code of judicial conduct that required a judge to respect and comply with all laws and act in a manner that promoted public confidence in the integrity and impartiality of the judiciary, to not allow their family, social,

or other relationships influence the judge's judicial conduct or judgment, and to be faithful to the law and maintain professional competence in it. Miss. Code of Jud. Conduct, Canons 1, 2A, 2B, 3B(1,2), 3E(1); Miss. Code Ann. § 97-11-1. Mississippi Commission on Judicial Performance v. Burton, 268 So. 3d 565 (Miss. 2019).

Judge violated section of Code of Judicial Conduct prohibiting conduct prejudicial to the administration of justice that brings judicial office into disrepute when he failed to timely rule in 28 civil cases; one case had not been resolved for seven years, and the most recent of the cases had been pending for over seven months before a formal complaint was filed. Miss. Const. art. 6, § 177A. Mississippi Commission on Judicial Performance v. McGee, 266 So. 3d 1003 (Miss. 2019).

Removal from office was appropriate sanction for judge's conduct, which included acting impatiently, raising his voice, making demeaning and insulting remarks, striking witness testimony and dismissing petitions for insufficient proof as a result of counsel's reflexive use of the word "okay," and failing to afford litigants the right to be heard before imposing counsel fees, all of which was significantly compounded by his persistent failure to cooperate with the investigation by the New York State Commission on Judicial Conduct, and fact that misconduct began within one year of a prior censure. Matter of O'Connor, 32 N.Y.3d 121, 112 N.E.3d 317 (2018).

Town court judge violated his ethical duty, warranting his removal, by using his judicial position to interfere in the disposition of his daughter's traffic ticket, and by telling prosecutor that in his opinion and that of his colleagues the matter should be dismissed. 22 NYCRR 100.2, 100.2(A–C). In re Ayres, 30 N.Y.3d 59, 63 N.Y.S.3d 737, 85 N.E.3d 1011 (2017).

Town court judge's acts of sending eight letters, including five ex parte communications, to County Court in connection with appeal from restitution order he had issued in a case, advocating for dismissal of the matter, were highly improper, warranting his removal as a judge; letters contained argumentative and biased statements in which judge asserted that the appeal was meritless and that defense counsel's arguments were ludicrous and totally beyond any rational thought process, and the letters disparaged County Court, defendant, and defense counsel. 22 NYCRR 100.3(B)(4, 6). In re Ayres, 30 N.Y.3d 59, 63 N.Y.S.3d 737, 85 N.E.3d 1011 (2017).

Circuit court judge "manifested" prejudice in performance of judicial duties, on basis of sexual orientation, in violation of judicial conduct rule, through his implementation of process for screening wedding applicants to ensure they were not same-sex applicants, who he refused to marry, even though such applicants could lawfully marry under state law; while process was designed to discreetly handle same-sex marriage requests without anyone outside judge's chambers being made aware of refusal, judge's course of action was evident to staff members, who he directed to check court registry for gender information about each requesting couple and to tell same-sex couples he was not available, which actions had not been taken before state's constitutional same-sex marriage ban was invalidated. Code of Jud. Conduct, JR 3.3(B). Day, 362 Or. 547, 413 P.3d 907 (2018).

Municipal court judge's ex parte communications with another judge regarding the second judge's favored parties in cases before the first judge were sufficient to warrant sanction of removal; first judge acknowledged that her actions were of a kind that were an affront to the administration of justice and diminish the judiciary at large, offending conduct occurred while the first judge was acting in her judicial capacity, and Court of Judicial Discipline was not obliged to prioritize first judge's character testimony over the interests of the public and judicial system at large. Pa. Const. art. 5, § 18(d)(1). In re Segal, 173 A.3d 603 (Pa. 2017).

[END OF SUPPLEMENT]

Footnotes

[1] Stanley v. Jones, 197 La. 627, 2 So. 2d 45 (1941).

[2] In re Justice of Peace Cook, 906 So. 2d 420 (La. 2005).
Violations of the canons contained in the code of judicial conduct can serve as a basis for the disciplinary action

provided for by state constitution. In re Williams, 85 So. 3d 5 (La. 2012).

[3] Matter of MacDowell, 57 A.D.2d 169, 393 N.Y.S.2d 748 (2d Dep't 1977).

[4] In re Jaffe, 59 Pa. D. & C.4th 477, 814 A.2d 308 (Ct. Jud. Discipline 2003).
The appropriate discipline for a circuit court judge who had been found guilty of serious campaign finance improprieties, including a violation of state campaign financing laws, as well as of deliberate efforts to mislead the voting public as to experience and qualifications to serve as judge, in violation of the code of judicial conduct, was removal from office. In re Renke, 933 So. 2d 482 (Fla. 2006).
As to bribery of judicial officials, generally, see Am. Jur. 2d, Bribery §§ 4, 11 to 13.

[5] In re Inquiry Concerning A Judge, Nos. 270 & 280 Hill, 357 N.C. 559, 591 S.E.2d 859 (2003).

[6] In re Charges of Judicial Misconduct, 404 F.3d 688 (2d Cir. Jud. Council 2005); In re Conduct of Ginsberg, 690 N.W.2d 539 (Minn. 2004).

[7] Gormley v. Judicial Conduct Commission, 332 S.W.3d 717 (Ky. 2010).
A judge's conduct in making false statements under oath in connection with a divorce proceeding, improperly listing cases on a no-progress docket, having excessive absences, and allowing a social relationship to influence the release of a criminal defendant from probation warranted the judge's removal from office. In re Nettles-Nickerson, 481 Mich. 321, 750 N.W.2d 560 (2008).
Although sanction of removal of a judge from the bench is reserved for those instances where the conduct is truly egregious and not merely an exercise of poor judgment, the "truly egregious" standard is measured with due regard to the fact that judges must be held to a higher standard of conduct than the public at large. Matter of Collazo, 91 N.Y.2d 251, 668 N.Y.S.2d 997, 691 N.E.2d 1021 (1998).

[8] Judicial Discipline and Disability Com'n v. Simes, 2009 Ark. 543, 354 S.W.3d 72 (2009).

[9] In re Daisy, 359 N.C. 622, 614 S.E.2d 529 (2005).

[10] Ohio State Bar Assn. v. Shattuck, 85 Ohio St. 3d 334, 1999-Ohio-271, 708 N.E.2d 199 (1999).

[11] In re Barr, 13 S.W.3d 525 (Tex. Review Trib. 1998).

[12] In re DiLeo, 216 N.J. 449, 83 A.3d 11 (2014).
Family court judge did not commit a good faith legal error, but acted in bad faith in erroneously ruling on the issue of proper venue/forum for an ex-wife's request for change of custody, and therefore the judge was subject to discipline, where the judge failed to provide the ex-husband even the most basic elements of procedural due process, the judge thwarted the ex-husband's every attempt to present evidence in support of the ex-husband's position, the judge acted as a judge of a family court that had no jurisdiction over the matter that had been presented to the judge through an unusual and extraordinary procedure, and when the ex-husband's counsel would not be bullied into going along with the judge's attempts to circumvent procedures and the law, the judge excluded counsel and dealt directly with the ex-husband, threatening the ex-husband with the loss of custody of another child unless the ex-husband accepted the judge's "agreed" order. Gormley v. Judicial Conduct Commission, 332 S.W.3d 717 (Ky. 2010).

[13] In re Inquiry Concerning Judge Robertson, 277 Ga. 831, 596 S.E.2d 2 (2004).

[14] In re Chaisson, 549 So. 2d 259 (La. 1989).

[15] Mississippi Com'n on Judicial Performance v. Harris, 131 So. 3d 1137 (Miss. 2013).

[16] In re Rome, 218 Kan. 198, 542 P.2d 676 (1975).

[17] Mississippi Com'n on Judicial Performance v. Bustin, 71 So. 3d 598 (Miss. 2011).

[18] Inquiry Concerning Hapner, 718 So. 2d 785 (Fla. 1998).
Removal of a circuit court judge from office was warranted on the basis of the party's conduct as an attorney before the party was elected to the bench in which the attorney was involved in making a quick and ethically flawed aggregate settlement agreement to settle claims against an insurer that involved the release of the clients' bad faith claims, though the clients were not informed and were not allowed to participate in that recovery; such conduct was fundamentally inconsistent with the responsibilities of judicial office and diminished the public's confidence in the

integrity of the judicial system. In re Watson, 174 So. 3d 364 (Fla. 2015), cert. denied, 136 S. Ct. 863, 193 L. Ed. 2d 766 (2016).

A judge's admitted and knowing practice of law while serving as a county judge, and the judge's advice to a criminal client that the client flee the United States to avoid prosecution, given while the judge was an attorney in private practice, warranted removal from judicial office, where ethical violations were grievous and formed part of same course of conduct, in that they involved representation of same client. In re Henson, 913 So. 2d 579 (Fla. 2005).

19 Kennick v. Commission On Judicial Performance, 50 Cal. 3d 297, 267 Cal. Rptr. 293, 787 P.2d 591, 87 A.L.R.4th 679 (1990) (disapproved of on other grounds by, Doan v. Commission on Judicial Performance, 11 Cal. 4th 294, 11 Cal. 4th 474a, 45 Cal. Rptr. 2d 254, 902 P.2d 272 (1995)).

End of Document

46 Am. Jur. 2d Judges IV C Refs.

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IV. Termination or Suspension of Office; Censure

C. Suspension; Censure

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 11

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 11

End of Document

46 Am. Jur. 2d Judges § 20

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IV. Termination or Suspension of Office; Censure

C. Suspension; Censure

§ 20. Suspension or censure of judge, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 11

A.L.R. Library

Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness, 82 A.L.R.4th 567

Power of court to remove or suspend judge, 53 A.L.R.3d 882

The power to remove a judge may include the power to suspend a judge during the pendency of a removal proceeding.[1] However, some constitutional provisions state that no suit for removal of a judge works a suspension from office but that the trial court may, following a hearing, suspend a judge subject to a review by the proper court.[2]

In lieu of removal, a state supreme court may, upon a proper showing of abuse or misconduct, order that a judge be suspended[3] or censured,[4] since removal is an extreme sanction which will only be imposed in the event of truly egregious circumstances.[5]

The suspension of a judge for a period of six months without pay was warranted, where the judge engaged in a practice of deliberately postponing the appointment of counsel to indigent defendants in probation violation cases until after the time period for disqualification of the judge had passed, for the stated and overt reason of preventing the public defender from disqualifying the judge, in violation of the code of judicial conduct.[6]

CUMULATIVE SUPPLEMENT

Cases:

Public reprimand was appropriate discipline for judge who failed to personally observe the high standards of conduct demanded of the judiciary, acted in a manner that does not promote public confidence in the integrity of the judiciary, and was not patient, dignified, and courteous to others, stemming from incident in which judge, while wearing his robe, confronted noisy people in lobby celebrating another judge's investiture ceremony, approached individual shaking her head, threatened her with contempt, and asked for her name and whether she was employed in the courthouse; court recognized judge's cooperation and otherwise unblemished career. Fla. Code of Jud. Conduct, Canons 1, 2A, 3B(4). Inquiry Concerning a Judge No. 20-059 re: Miller, 304 So. 3d 1214 (Fla. 2020).

Public reprimand of judge was warranted, in judicial disciplinary case, where judge, who loudly ordered a courtroom deputy, in front of the jury, to remove one of defendant's attorneys from a sidebar conference, admitted his conduct and accepted full responsibility for his actions, he had no prior judicial disciplinary history, he voluntarily signed up for stress management counseling, and the discipline was similar to discipline previously imposed for similar conduct. Fla. Code of Jud. Conduct, Canon 1, 2, 3B(1,4,7). Re Bailey, 267 So. 3d 992 (Fla. 2019).

Probate judge, who faced sanctions in judicial discipline action for violations of the Code of Judicial Conduct, could not support his claim that a two-year suspension from practice and the $5,000 forfeiture were more severe sanctions than sanctions that had been imposed on other judges similarly situated, where records of referrals to the Supreme Judicial Court of claims of professional misconduct by attorneys or judges for over 30 years showed that no individual was subject to as many referrals for professional discipline as judge. Matter of Nadeau, 2017 ME 191, 170 A.3d 255 (Me. 2017).

Suspension from practice of law for two years and forfeiture of $5,000 was appropriate sanction for conduct of probate judge, which included issuing directive that attorneys not receive court appointments based on personal ill-will, ordering attorney to destroy lawfully obtained public record, and urging litigants to contact county commissioners to support increased funding for court days, which would have increased his salary, in violation of canons of judicial conduct; judge had significant prior disciplinary history, judge's actions were often carried out in intemperate and vindictive fashion, judge had not fully acknowledged intemperate nature of his decisions, and prior corrective efforts were not effective in dissuading judge from engaging in such conduct. Matter of Nadeau, 2017 ME 121, 168 A.3d 746 (Me. 2017).

Public censure, rather than 30-day suspension without pay, was warranted as a sanction for circuit court judge who committed misconduct by failing to conduct herself in a respectful and courteous manner toward children who refused to participate in parenting time with their father in highly contentious divorce and custody case; judge's good faith legal errors in holding the children in contempt did not constitute judicial misconduct, judge's inappropriate conduct was isolated, there was no evidence of an unequal application of justice, and judge's frustration with children's deliberately defiant behavior over a lengthy period of time was understandable. In re Gorcyca, 500 Mich. 588, 902 N.W.2d 828 (2017).

Judicial Commissioner's recommendation that district court judge be censured was appropriate sanction for judge's violations of Canons of Code of Judicial Conduct requiring judge to uphold integrity of judiciary, to respect and comply with law and conduct herself in manner that promoted public confidence in integrity and impartiality of judiciary, to be patient, dignified and courteous to litigants, witnesses, and lawyers, and to accord every person legally interested in proceeding full right to be heard according to law, in view of judge's stipulation to Commission's findings and conclusions, and her candor and cooperation with disciplinary proceedings. N.C. Code of Jud. Conduct, Canon 1, 2(A), 3(A)(3), (4). In re Foster, 832 S.E.2d 684 (N.C. 2019).

Public reprimand of deputy commissioner of Industrial Commission was warranted as sanction for commissioner's vehicle collision while under the influence of an impairing substance, which resulted in violations of canons requiring a judge to uphold the integrity and independence of the judiciary and to avoid impropriety in the judge's activities and statute prohibiting conduct prejudicial to the administration of justice that brought the judicial office into disrepute. N.C. Gen. Stat. Ann. § 7A-376; N.C. Code of Jud. Conduct, Canons 1, 2. In re Shipley, 811 S.E.2d 556 (N.C. 2018).

Public reprimand of judge was warranted, in disciplinary proceeding where judge, who later pled guilty to one count of operating a vehicle while under the influence of alcohol (OVI), informed police officers during traffic stop that he was a judge, said he was not asking for favors, but then asked if there was anything he could do to avoid arrest, and judge did not have a history of prior discipline, he made full and free disclosure to the Board of Professional Conduct and exhibited a

cooperative attitude toward the disciplinary proceedings, submitted evidence of his good character and reputation, and had other sanctions imposed for his conduct. Ohio Code of Jud. Conduct, Rule 1.1, 1.3; Ohio Gov. Bar R. V(13)(C)(1), (4-6). Disciplinary Counsel v. Gonzalez, 160 Ohio St. 3d 229, 2020-Ohio-3259, 155 N.E.3d 864 (2020).

Public reprimand was appropriate sanction for misconduct of judge, who pled guilty to operation of motor vehicle while under the influence of alcohol (OVI), and, during arrest for that crime, stated that she was judge on court of common pleas, in violation of judicial conduct rules; no aggravating factors were present, and mitigating factors included lack of prior disciplinary record, cooperation in disciplinary process, imposition of other penalties and sanctions for her conduct, evidence of good character and reputation, lack of dishonest or selfish motive, and timely, good-faith effort to rectify misconduct. Ohio Gov. Bar R. V(13)(B, C). Disciplinary Counsel v. Doherty, 159 Ohio St. 3d 364, 2020-Ohio-1422, 150 N.E.3d 949 (2020).

Supreme Court would defer final judicial discipline regarding pending felony charge against district judge arising from her alleged neglect of her state tax obligations, and would instead place judge on probation with conditions, until felony charge was resolved. Matter of Disciplinary Proceedings Concerning Coleman, 2019 OK 77, 454 P.3d 1280 (Okla. 2019).

Immediate and indefinite suspension, together with public reprimand and prohibition on ever holding judicial office in the state, was appropriate sanction for assistant judge's violation of multiple judicial canons in connection with his improper conduct regarding assets of estate of his uncle's wife; assistant judge's violations had continued throughout his tenure as assistant judge, judge refused to take responsibility for his actions, and judge had provided demonstrably false testimony on more than one occasion at disciplinary hearing. Vt. Code Jud. Conduct, Canons 1, 2A, 4A(2), 5B(2). In re Kane, 2017 VT 48, 169 A.3d 180 (Vt. 2017).

[END OF SUPPLEMENT]

Footnotes

1 In re Toler, 216 W. Va. 743, 613 S.E.2d 604 (2005).
As to removal of judges, generally, see §§ 16 to 19.

2 Stanley v. Jones, 197 La. 627, 2 So. 2d 45 (1941).

3 In re Hathaway, 464 Mich. 672, 630 N.W.2d 850 (2001).

4 In re McBryde, 117 F.3d 208 (5th Cir. 1997); In re Wimbish, 733 So. 2d 1183 (La. 1999).
A public reprimand is the most severe sanction the court can impose when a judge no longer holds judicial office. In re Evans, 376 S.C. 540, 658 S.E.2d 78 (2008).
Where the conduct results in the creation of an appearance of impropriety, but where no actual impropriety is demonstrated, and the conduct is essentially negligent, the baseline sanction will, generally, be either private reprimand or public censure under the ABA Standards, depending on the amount of harm caused and subject to increase or decrease dependent upon the presence of aggravating or mitigating factors. In re Inquiry Concerning a Judge, 788 P.2d 716 (Alaska 1990).

5 In re Kaiser, 111 Wash. 2d 275, 759 P.2d 392 (1988).

6 In re Mennemeyer, 505 S.W.3d 282 (Mo. 2017).

46 Am. Jur. 2d Judges V A Refs.

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V. Powers and Duties

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 22(5), 23, 24, 27 to 31

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 22(5), 23, 24, 27 to 31

End of Document

46 Am. Jur. 2d Judges § 21

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V. Powers and Duties

A. In General

§ 21. Powers and duties of judge, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 23, 24, 27, 28, 31

Forms

Forms relating to appointment, generally, see Am. Jur. Legal Forms 2d, Judges [Westlaw®(r) Search Query]

The powers of a judge are those that are conferred upon the judge by the constitution and by statute and those that are inherent in the judge's office.[1] The duties of the office of judge include all those that fairly lie within its scope, those that are essential to the accomplishment of the main purposes for which the office was created, and those that, although incidental and collateral, are germane to or serve to promote or benefit the accomplishment of the principal purposes; all such duties are official, and the incumbent is obliged to perform them.[2] Thus, district judges have no obligation to act as counsel or paralegal to pro se litigants, and, by the same token, have no obligation to assist attorneys representing a state.[3] A judge's power to make an order exists solely by virtue of the judge's function as an adjudicator; it does not extend beyond the performance of judicial duties.[4] Whether sitting separately or together, the judges of the superior court hold but one and the same court, and the jurisdiction they exercise in any cause is that of the court, and not the individual.[5]

Appointive judicial officers cannot rightfully exercise authority unless they receive their appointment as required by law,[6] although, if they do not, their acts may be valid and binding under the rules governing the acts of de facto officers.[7]

In the absence of statute, a judge ordinarily has no duty to perform with reference to a case filed in the court until a party or someone interested in the case invokes the judgment in some legal manner.[8]

Footnotes

[1] District Attorney for Norfolk Dist. v. Quincy Div. Dist. Court Dept., 444 Mass. 176, 827 N.E.2d 172 (2005).
As to the powers and duties of de facto judges, see § 226.
As to the powers and duties of special and substitute judges, see §§ 232, 242 to 248.
As to the authority of successor judges, see § 29.
As to the authority of a judge to reconsider an interlocutory ruling by another judge, see §§ 36 to 41.

[2] U.S. v. Ryder, 44 M.J. 9 (C.A.A.F. 1996); In re Charges of Judicial Misconduct, 404 F.3d 688 (2d Cir. Jud. Council 2005).
As to the powers and duties of judges with respect to trials, see Am. Jur. 2d, Trial §§ 1 et seq.

[3] Day v. McDonough, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006).

[4] In re Eastmoore, 504 So. 2d 756 (Fla. 1987).

[5] Magallan v. Superior Court, 192 Cal. App. 4th 1444, 121 Cal. Rptr. 3d 841 (6th Dist. 2011).

[6] Nollette v. Christianson, 115 Wash. 2d 594, 800 P.2d 359 (1990).

[7] §§ 226 to 231.

[8] Utah Ass'n of Credit Men v. Bowman, 38 Utah 326, 113 P. 63 (1911).

End of Document

46 Am. Jur. 2d Judges § 22

American Jurisprudence, Second Edition | May 2021 Update

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V. Powers and Duties

A. In General

§ 22. Delegation of judge's duties

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 23, 24

A judge generally may not delegate judicial authority or the performance of judicial acts,[1] even with the consent of the parties.[2] However, many jurisdictions allow courts to appoint referees to assist them in the performance of their judicial duties.[3]

Footnotes

1 Morrow v. Corbin, 122 Tex. 553, 62 S.W.2d 641 (1933).
There can be no such thing as a deputy judge. Bass v. Saline County, 171 Neb. 538, 106 N.W.2d 860 (1960).

2 Morrow v. Corbin, 122 Tex. 553, 62 S.W.2d 641 (1933).

3 Am. Jur. 2d, References § 21.

End of Document

46 Am. Jur. 2d Judges § 23

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Judges
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V. Powers and Duties

A. In General

§ 23. Particular duties as acts of court

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 23, 24

In order for the duties of the judge to be considered acts of the court, the duties must be done within the judge's jurisdiction.[1] Whether a duty is to be performed by the judge or the court is generally to be determined from the character of the duty rather than by the use of the terms "judge" or "court" in a controlling statute.[2] An act done in open court that could have been done by a judge at chambers is not invalid for that reason.[3]

Footnotes

1 Archie v. Lanier, 95 F.3d 438, 1996 FED App. 0297P (6th Cir. 1996).

2 Broadfoot v. City of Florence, 253 Ala. 455, 45 So. 2d 311 (1950); Richmond v. Shipman, 63 Cal. App. 3d 340, 133 Cal. Rptr. 742 (1st Dist. 1976).

3 § 27.

46 Am. Jur. 2d Judges § 24

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V. Powers and Duties

A. In General

§ 24. Territorial limits of power of judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 27 to 30

Unless otherwise authorized by the constitution or a statute, a judge generally has no authority to perform judicial duties or exercise judicial functions outside of the territorial limits of the county or district for which the judge was elected or appointed.[1] Thus, any attempt by a judge to exercise jurisdiction outside the territorial limits of the jurisdiction is a nullity.[2]

However, state[3] and territorial[4] constitutions and statutes often permit judges of different counties to hold court for each other or perform each other's duties under certain circumstances, or to exchange circuits,[5] or provide for the calling in of a judge of another county or district to act in the place of a judge who is disqualified or incapacitated.[6] For instance, a circuit court judge has jurisdiction within the judge's own circuit and in any area outside such circuit in a proceeding where the judge is appointed special judge.[7] Under some statutes, in the absence of a resident or presiding judge, jurisdiction is conferred on a judge of an adjoining circuit.[8] In addition, a judge authorized to exercise powers over cases pending in the district in chambers or in vacation may exercise such powers while sitting outside the district.[9]

Footnotes

1 McIntosh v. Bowers, 143 Wis. 74, 126 N.W. 548 (1910).

2 Ertman v. Municipal Court, 68 Cal. App. 2d 143, 155 P.2d 908 (1st Dist. 1945).
As to territorial limitations on the jurisdiction of courts, generally, see Am. Jur. 2d, Courts § 100.

3 Collins v. Johnston, 237 U.S. 502, 35 S. Ct. 649, 59 L. Ed. 1071 (1915).

4 Borrego v. Cunningham, 164 U.S. 612, 17 S. Ct. 182, 41 L. Ed. 572 (1896).

5 § 241.

[6] § 234.

[7] Baze v. Com., 276 S.W.3d 761 (Ky. 2008).

[8] Henderson v. Glen Oak, Inc., 179 Ga. App. 380, 346 S.E.2d 842 (1986), decision aff'd, 256 Ga. 619, 351 S.E.2d 640 (1987).

[9] Lockert v. Lockert, 116 N.C. App. 73, 446 S.E.2d 606 (1994), writ allowed, 338 N.C. 311, 450 S.E.2d 490 (1994). As to the power of judges to perform duties in chambers, both during term time and while the court is in vacation, see § 27.

End of Document

46 Am. Jur. 2d Judges § 25

American Jurisprudence, Second Edition | May 2021 Update

Judges
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V. Powers and Duties

A. In General

§ 25. Apportioning work among judges of court

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 23, 24

Forms

Forms relating to apportioning work load among judges, see Am. Jur. Pleading and Practice Forms, Judges [Westlaw®(r) Search Query]

Where a court is composed of several judges, the division of the work among them is a strictly judicial duty, and is an appropriate function of the office of chief justice of such court.[1]

A statutory provision for the assignment by the chief justice of judges to hear particular cases or classes of cases does not contravene a constitutional provision that all judicial officers must be appointed by the governor.[2]

Subject only to the substantive law relating to the disqualification of judges, litigants have no right to have, or not have, any particular judge of a court hear their cause and have no due process right to be heard before any assignment or reassignment of the particular case to a particular judge; the assignment and reassignment of specific court cases between or among the judges of a multiple-judge court is a matter within the internal government of that court and a litigant does not have standing to enforce internal court policy with respect to the assignment of judges.[3]

Footnotes

[1] Ashley v. Wait, 228 Mass. 63, 116 N.E. 961, 8 A.L.R. 1463 (1917).
A commission issued by the chief justice assigning a district court judge to another district to hear a case was not

required to contain a finding that the case was "exceptional" to be valid, and the assignment for "one day, or until the business is disposed of" did not authorize the judge to conduct only a one-day session of court but assigned the judge to the district until matters before the judge were concluded. Lockert v. Lockert, 116 N.C. App. 73, 446 S.E.2d 606 (1994), writ allowed, 338 N.C. 311, 450 S.E.2d 490 (1994).

[2] Ketcham v. Lehner, 149 Vt. 314, 542 A.2d 290 (1988).

[3] Kruckenberg v. Powell, 422 So. 2d 994 (Fla. 5th DCA 1982).

End of Document

46 Am. Jur. 2d Judges § 26

American Jurisprudence, Second Edition | May 2021 Update

Judges
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V. Powers and Duties

A. In General

§ 26. Appointment and removal of judicial officers; fixing salaries

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 22(5), 23, 24

Although there is authority for the view that statutes imposing or conferring upon judges the power to appoint other officers are unconstitutional as an encroachment on the legislative or executive department, or both,[1] there is also authority to the effect that such statutes are valid,[2] even if the duties of the appointees have no connection with the functions of courts.[3]

Although the exact limit of the power of judges as to appointments is unclear, judges may appoint many officers of inferior grades, especially those who are more or less under the control of the court making the appointment or necessary to the existence of a court, such as clerks, reporters, and bailiffs, and officers necessary to enable the court to transact business.[4]

Under statutes in some jurisdictions, certain judges have the authority to fix the salaries of their employees,[5] so long as the employees are shown to be absolutely necessary to the operation of the court.[6]

Footnotes

1 In re Opinion of the Justices, 300 Mass. 596, 14 N.E.2d 465, 118 A.L.R. 166 (1938).

2 Minsinger v. Rau, 236 Pa. 327, 84 A. 902 (1912).

3 Sartin v. Snell, 87 Kan. 485, 125 P. 47 (1912).
An order, made pursuant to statute by the presiding judge of a county municipal court district, that the county marshal hire two more deputies was valid and enforceable based on a finding by the council of supervising judges for the district that an emergency existed by reason of the legislature's creation of two new judgeships; the statute on which the order was based conferred on the judges in clear and unambiguous language the power to cope with an increase in business or other emergency. Board of Supervisors v. Krumm, 62 Cal. App. 3d 935, 133 Cal. Rptr. 475 (4th Dist. 1976).

[4] State v. Jackson, 134 La. 599, 64 So. 481 (1913).
The amendment of a statute, changing "hearing officer" to "housing judge" and denominating housing judges "duly constituted judicial officers" merely invested housing judges with authority and dignity, while keeping housing judges as essential referees appointed by the court to assist it in the performance of its judicial functions; thus, the statute as amended did not violate the doctrine of separation of powers by providing for the appointment of housing judges by members of the judiciary rather than by the executive branch of the government. Babigan v. Wachtler, 133 Misc. 2d 111, 506 N.Y.S.2d 506 (Sup 1986), judgment aff'd, 126 A.D.2d 445, 510 N.Y.S.2d 473 (1st Dep't 1987), order aff'd, 69 N.Y.2d 1012, 517 N.Y.S.2d 905, 511 N.E.2d 49 (1987).

[5] Duncan v. Pogue, 759 S.W.2d 435 (Tex. 1988).

[6] Venhaus v. State ex rel. Lofton, 285 Ark. 23, 684 S.W.2d 252 (1985).

End of Document

46 Am. Jur. 2d Judges § 27

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

A. In General

§ 27. Judges acting in vacation and at chambers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 27, 28

Constitutions and statutes generally confirm the common-law practice of performing many of the duties of courts of general jurisdiction at judges' chambers, both during term time and while the court is in vacation, by conferring authority in particular matters on the court or the judge, or by a direct provision authorizing proceedings at chambers.[1] The legislature, where not restricted by the constitution, may confer such power on judges.[2] Where the constitution provides that the several judges of the courts of record will have such jurisdiction at chambers as may be provided by law, the judges, as such, have no authority at chambers except such as is expressly given them by law.[3] In this connection, generally, the term "court" may be interpreted to mean a judge in vacation or at chambers, where it is necessary to effect the intention of the legislature.[4] However, a judge sitting in vacation is not the court[5] and has no power to make an order that a statute requires to be made by the court.[6]

Footnotes

1 In re Daly, 284 Minn. 567, 171 N.W.2d 818 (1969).
Under a constitutional provision that the court must always be open, it cannot be successfully contended that an act done by a judge sitting on the bench where no jury is required has any greater legal force than the same act done in an adjoining room by courtesy, styled the judge's chambers, especially where the judge sat at a time and place agreed upon by the parties. Meisenheimer v. Meisenheimer, 55 Wash. 32, 104 P. 159 (1909).

2 Thorwarth v. Blanchard, 87 Vt. 38, 87 A. 52 (1913).

3 Morrill County v. Bliss, 125 Neb. 97, 249 N.W. 98, 89 A.L.R. 932 (1933).

4 Neal v. Haight, 187 Or. 13, 206 P.2d 1197 (1949).

5 Louisville & N. R. Co. v. McDonald, 79 Miss. 641, 31 So. 417 (1902).

[6] State ex rel. Nelson v. Grimm, 219 Wis. 630, 263 N.W. 583, 102 A.L.R. 220 (1935).
The authority of a judge to accept a complaint for filing pursuant to statute is a function which a judge can only perform as "the court," and not away from the court room; accordingly, a complaint for damages for personal injuries presented to a judge who accepted it and marked it "filed" at the judge's residence on the day of the expiration of the statutory period of limitations was ineffective to interrupt the running of the statute of limitations. Richmond v. Shipman, 63 Cal. App. 3d 340, 133 Cal. Rptr. 742 (1st Dist. 1976).

End of Document

46 Am. Jur. 2d Judges § 28

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

A. In General

§ 28. Powers and duties of judge after expiration of term

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 31

A judge whose term of office has ceased may perform clerical duties, such as the making of a finding for the purpose of perfecting an appeal[1] or the signing, nunc pro tunc, of an order for the entry of a judgment pursuant to a docket entry made before the expiration of the term.[2] Where a judge signs an otherwise valid written order or judgment prior to leaving office, the trial court, through the proper county clerk of court, retains jurisdiction to file that judgment, even after the trial judge retires, and thereby completes the steps required for entry.[3] However, where the authority of a trial judge is terminated and there is pending before the trial judge matters upon which the judge has not ruled, the judge's authority to rule terminates at the time of the expiration of the party's authority as judge.[4] Generally, when a judge vacates office before submitting a decision in an assigned case, no other person is authorized to submit the decision on the judge's behalf.[5]

Footnotes

1 Todd v. Bradley, 97 Conn. 563, 117 A. 808, 25 A.L.R. 22 (1922).

2 Lansing v. Lansing, 736 S.W.2d 554 (Mo. Ct. App. E.D. 1987).

3 Robertson v. Steris Corp., 237 N.C. App. 263, 765 S.E.2d 825 (2014).

4 State ex rel. General Motors Corp. v. Indus. Comm., 159 Ohio App. 3d 644, 2005-Ohio-356, 825 N.E.2d 167 (10th Dist. Franklin County 2005).
As to successor judges, generally, see §§ 29 to 35.

5 Wildwood Medical Center, L.L.C. v. Montgomery County, 405 Md. 489, 954 A.2d 457 (2008).

Works.

46 Am. Jur. 2d Judges V B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

B. Successor Judges

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 32

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 32

End of Document

46 Am. Jur. 2d Judges § 29

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

B. Successor Judges

§ 29. Authority of successor judges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 32

A.L.R. Library

Power of Successor or Substituted Judge, in Civil Case, to Render Decision or Enter Judgment on Testimony Heard by Predecessor, 84 A.L.R.5th 399

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747

Substitution of judge in state criminal trial, 45 A.L.R.5th 591

Forms

Forms relating to successor judges, generally, see Am. Jur. Pleading and Practice Forms, Judges [Westlaw®(r) Search Query]

In some jurisdictions, a successor judge may complete only those acts left incomplete by a predecessor that do not require the successor to weigh and compare testimony.[1] In some of these jurisdictions, statutes authorize successor judges to continue, hear, and determine actions just as their predecessors might have but provide that a successor judge may not weigh and compare testimony of witnesses whom the successor did not see or hear.[2] Under the Individual Assignment System, the death or disability of an assigned judge merely results in the reassignment of the case to another judge, who then has full authority to perform the functions of the assigned judge, including determination of pending motions.[3]

Generally, where a judge fails to complete work, but leaves behind such memoranda that there can be known just what the judge did, the judge's successor may complete it.[4] In addition, in a proper case, a successor judge may, by nunc pro tunc judgment or decree, make the record of the successor judge's court speak the truth even if such a procedure involves the action of a predecessor judge,[5] and a successor judge has the power to vacate or modify a predecessor's interlocutory rulings, such as an order on a motion for summary judgment.[6] While a successor judge has the authority to correct any errors in prior interlocutory rulings on matters of law, a successor judge should give credence to a predecessor's rulings on issues of law.[7] However, a judge usually cannot finish the performance of a duty already entered upon by a predecessor where that duty involves the exercise of judgment and the application of legal knowledge and judicial deliberation to facts known only to the predecessor.[8] When a successor judge makes a determination that the successor cannot perform postverdict duties, a new trial may be granted.[9]

CUMULATIVE SUPPLEMENT

Cases:

Successor trial judge was permitted to reconsider original judge's decision on telephone services provider's motion to exclude education entities' expert's testimony in action brought by educational entities against telephone services provider brought after educational entities experienced telephone problems during student recruitment; although the two rulings came from different judges, issue had not been raised before or ruled on by an appellate court. Utah R. Evid. 702. California College Inc. v. UCN Inc., 2019 UT App 39, 440 P.3d 825 (Utah Ct. App. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Fry v. Fry, 887 So. 2d 438 (Fla. 2d DCA 2004).
As to a successor judge's authority to enter judgment or render a decision, generally, see § 31.

2 People v. Cameron, 194 A.D.2d 438, 599 N.Y.S.2d 256 (1st Dep't 1993).
As to the right and duty of a successor of the trial judge to determine a motion for a new trial, see Am. Jur. 2d, New Trial § 358.
As to the substitution of a judge during trial, generally, see Am. Jur. 2d, Trial §§ 157 to 159.

3 Degraff Moffly/General Contractors Inc. v. Krolick, 194 A.D.2d 964, 599 N.Y.S.2d 165 (3d Dep't 1993).

4 Hoffman v. Shuey, 223 Ky. 70, 2 S.W.2d 1049, 58 A.L.R. 842 (1928).

5 Whack v. Seminole Memorial Hosp., Inc., 456 So. 2d 561 (Fla. 5th DCA 1984).

6 Hull & Company, Inc. v. Thomas, 834 So. 2d 904 (Fla. 4th DCA 2003).
Successor judges possess the same discretion as their predecessors, and can overturn their predecessor's interlocutory orders. United States v. Chapman, 851 F.3d 363 (5th Cir. 2017).

7 Gemini Investors III, L.P. v. Nunez, 78 So. 3d 94 (Fla. 3d DCA 2012).

8 People v. Wembley, 342 Ill. App. 3d 129, 277 Ill. Dec. 382, 796 N.E.2d 97 (1st Dist. 2003).
As to the propriety of a change of judges during the trial of a case, see Am. Jur. 2d, Trial §§ 157 to 159.

9 Witt v. Akron Express, Inc., 159 Ohio App. 3d 164, 2004-Ohio-6837, 823 N.E.2d 473 (4th Dist. Gallia County 2004).

End of Document

46 Am. Jur. 2d Judges § 30

American Jurisprudence, Second Edition | May 2021 Update

Judges
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V. Powers and Duties

B. Successor Judges

§ 30. Successors of courts having several judges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 32

A.L.R. Library

Power of Successor or Substituted Judge, in Civil Case, to Render Decision or Enter Judgment on Testimony Heard by Predecessor, 84 A.L.R.5th 399

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747

Where a trial court is composed of several judges, a continuing judge may act on matters submitted to the court before the end of the term of another member of the court.[1] A statutory provision requiring justices of the state supreme court assuming office as successors to justices who left the bench prior to the end of their term to serve out the unexpired term of their predecessor rather than be appointed to an initial six-year term of their own is constitutional.[2] Where a judge of an appellate court dies after argument but before decision in the case, the continuing judges may decide the case without reargument, at least where a majority of the continuing members are in agreement.[3] Although there is authority for the view that where an appellate court is reconstituted after the decision of the case but before the time for filing a petition for rehearing has run or before the decision on such a petition has been made, the new judges may participate in the decision on the petition for rehearing,[4] there is also authority to the contrary.[5]

Footnotes

1 Lockhart v. Longmore, 189 Pa. Super. 455, 151 A.2d 829 (1959).

[2] Peck v. Douglas, 148 Vt. 128, 530 A.2d 551 (1987).

[3] Com. v. Cannon, 387 Pa. Super. 12, 563 A.2d 918 (1989).

[4] Glasser v. Essaness Theatres Corp., 346 Ill. App. 72, 104 N.E.2d 510 (1st Dist. 1952), judgment aff'd, 414 Ill. 180, 111 N.E.2d 124 (1953).

[5] Flaska v. State, 1946-NMSC-035, 51 N.M. 13, 177 P.2d 174 (1946).

End of Document

46 Am. Jur. 2d Judges § 31

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

B. Successor Judges

§ 31. Successor judge entering judgment or rendering decision

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 32

A.L.R. Library

Power of Successor or Substituted Judge, in Civil Case, to Render Decision or Enter Judgment on Testimony Heard by Predecessor, 84 A.L.R.5th 399

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747

In some jurisdictions, a successor judge has no power to enter a judgment or render a decree in a case where testimony has been taken before a predecessor,[1] and unless the parties consent or waive their rights, no judge other than the one who heard the testimony in the case may grant a judgment.[2] In some of these jurisdictions, where oral testimony is offered at the trial and the cause is left undetermined, a succeeding trial judge cannot decide, or make findings in, the case without a trial de novo on all of the issues[3] even if the predecessor judge has announced findings and conclusions[4] or has actually prepared findings but has not announced or signed them.[5] The rationale underlying the general rule that a successor judge may not make findings of fact or conclusions of law without a trial de novo is that due process entitles a litigant to have all the evidence submitted to a single judge who can see the witnesses testify and thus weigh their testimony and judge their credibility.[6]

However, other jurisdictions follow the view that where a judge retires or dies before rendering judgment, if the case had been tried before, and submitted to, that judge, the successor may render judgment on the record of the evidence after hearing the argument and without hearing further testimony.[7] For instance, a successor judge who took over the docket of an assigned judge who became unavailable after the close of a bench trial had evidence to make findings of fact and conclusions of law necessary to enter a judgment in the employee's favor on a wrongful termination claim; the findings that the employee's termination was not in compliance with the terms of the parties' employment agreement and that the employer did not have

reasonable cause to terminate the plaintiff were based on transcripts, exhibits, and evidence during trial, and no crucial credibility determinations were necessary.[8] When the judge presiding over the original proceedings has retired, the district court, on remand following an appeal, must make a certification regarding familiarity with the record and a determination that the case may be completed without prejudice to the parties, prior to conducting further proceedings or, alternatively, order a new trial.[9] A successor judge may determine a case on the record of the evidence offered before a predecessor unless the successor determines, in the exercise of a reviewable discretion, that there is evidence that is absent from the record and that is necessary to a determination of the case.[10]

Where the trial judge dies or becomes disabled after the trial and verdict of a jury, or after findings of fact and conclusions of law are filed, the successor judge may enter judgment.[11] A successor judge may sign a judgment rendered by a predecessor if the predecessor fails to sign it during the predecessor's term of office.[12] A successor judge in a termination of parental rights proceeding, who presided over the case after the original trial judge resigned from the bench one day after the entry of judgment, did not abuse the judge's discretion or violate due process by ruling on the parents' postjudgment motions to alter or amend the judgment and for additional findings without holding a new trial; all of the evidence was preserved, there was no defect in recording or other barrier to review of the entire proceedings, and the added value of observing live testimony was not so significant that a new trial was necessary, given the importance of prompt decision-making regarding permanency for the children.[13] However, a successor judge, who was appointed as a special judge after the trial judge was recused and who sat in an inferior position to the trial judge, did not have unbridled discretion, and thus did not possess the power to vacate the trial judge's order granting a new trial, in an executrix's wrongful death action against a nursing home, where the trial judge observed the entire trial, all the witnesses, and the jury, and was in the best place to judge the prejudicial effect of evidence, and to judge whether any evidence led to bias, passion, and prejudice on the part of the jury.[14]

Some jurisdictions have enacted statutes and court rules providing that a successor judge may perform such remaining duties as are necessary to be performed, including the entry of a judgment or order, after findings of fact and conclusions of law have been filed in the cause.[15] The Federal Rules of Civil Procedure[16] provides that on remand to a new judge for new findings of fact on conclusions of law, the successor judge may make findings on the basis of the existing record, may supplement the record, or may grant a new trial at the judge's discretion.[17] However, under some rules or statutes, a successor judge may not be authorized to file findings of fact and conclusions of law where the original judge had not done so,[18] even if transcribed oral opinions of the original judge tend to indicate the original judge's findings of fact and conclusions of law.[19] Also, a successor judge may not make a decision based on conflicting evidence that a predecessor judge heard.[20] A statute may expressly provide that on the death of a judge, when the office is vacant for any cause, or when the judge is absent a successor judge, no matter how chosen, may sign any order of court left unsigned by a predecessor; such a statute may authorize judgment by a successor judge only where the predecessor judge is found to be "unable" to do so.[21]

Various statutes or rules do not grant authority to a successor or substituted judge to render a decision or judgment in a case in which the evidence was presented before the predecessor.[22]

CUMULATIVE SUPPLEMENT

Cases:

In dispute between arrestee's estate and the individual who posted bond for arrestee over entitlement to receive the return of bond money after arrestee's death resulted in dismissal of charges against him, trial judge who was appointed after original trial judge recused himself had authority to reconsider original judge's summary judgment ruling that estate had standing to seek return of bond money, despite contention that individual never requested reconsideration of original ruling; individual implicitly requested reconsideration, and estate implicitly agreed to such reconsideration, when their attorneys summarized their legal arguments, and parties discussed whether second trial judge would hear evidence or would pick up from arguments and evidence offered to first trial judge. Sharp v. State, 142 N.E.3d 435 (Ind. Ct. App. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Dickman v. Dickman, 536 So. 2d 1079 (Fla. 4th DCA 1988).

2 Hinman v. Hinman, 443 N.W.2d 660 (S.D. 1989).
A party waives the right to object to a successor judge's exercise of authority by failing to make a timely objection. Moffitt v. Moffitt, 749 P.2d 343 (Alaska 1988).
As to stipulation by parties that an action may be decided by a successor judge, generally, see § 32.

3 Blitch v. Owens, 519 So. 2d 704 (Fla. 2d DCA 1988).

4 Carr v. Byers, 578 So. 2d 347 (Fla. 1st DCA 1991).

5 Grudzina v. New Mexico Youth Diagnostic & Development Center, 104 N.M. 576, 1986-NMCA-047, 725 P.2d 255 (Ct. App. 1986), writ quashed, 104 N.M. 460, 722 P.2d 1182 (1986).
As to retrial of a case by a successor judge, generally, see § 35.

6 Smith v. Freeman, 232 Ill. 2d 218, 327 Ill. Dec. 683, 902 N.E.2d 1069 (2009).

7 Jackson v. State of Alabama State Tenure Com'n, 405 F.3d 1276, 197 Ed. Law Rep. 499 (11th Cir. 2005).
While a second judge, who presided over a primary residential responsibility of a child case after the first judge disqualified the judge, did not specifically state the judge could complete the case without prejudice to the parties, the judge's statement that the judge could fairly and intelligently rule on all issues complied with the rule, providing that a successor judge may proceed in a case upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. Schweitzer v. Mattingley, 2016 ND 231, 887 N.W.2d 541 (N.D. 2016).
A successor judge, following a defendant's conviction of refusal to halt, did not err by not certifying familiarity with the record before denying the defendant's motion for a new trial; the requirement that a successor judge certify familiarity with the record only applies when the judge presiding at trial cannot complete the trial. State v. Beaulieu, 2016 ND 128, 881 N.W.2d 654 (N.D. 2016).

8 Landa v. CampusEAI, Inc., 2016-Ohio-298, 58 N.E.3d 462 (Ohio Ct. App. 8th Dist. Cuyahoga County 2016).

9 In re Estate of Bartelson, 2015 ND 147, 864 N.W.2d 441 (N.D. 2015).

10 St. Louis Southwestern Ry. Co. v. Henwood, 157 F.2d 337 (C.C.A. 8th Cir. 1946).

11 Grudzina v. New Mexico Youth Diagnostic & Development Center, 104 N.M. 576, 1986-NMCA-047, 725 P.2d 255 (Ct. App. 1986), writ quashed, 104 N.M. 460, 722 P.2d 1182 (1986).

12 Hoffman v. Shuey, 223 Ky. 70, 2 S.W.2d 1049, 58 A.L.R. 842 (1928).

13 In re C.P., 2016 ME 18, 132 A.3d 174 (Me. 2016).

14 Pinecrest, LLC and Mastercare, Inc. v. Harris ex rel. Estate of Callendar, 40 So. 3d 557 (Miss. 2010).

15 Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982).

16 Fed. R. Civ. P. 63.

17 Golf City, Inc. v. Wilson Sporting Goods, Co., Inc., 555 F.2d 426, 23 Fed. R. Serv. 2d 1176 (5th Cir. 1977).

18 Hinman v. Hinman, 443 N.W.2d 660 (S.D. 1989).

19 Ledoux v. Southern Farm Bureau Cas. Ins. Co., 337 So. 2d 906 (La. Ct. App. 3d Cir. 1976).

20 Liljestrand v. Dell Enterprises, Inc., 287 Neb. 242, 842 N.W.2d 575 (2014).

21 Durgin v. Robertson, 428 A.2d 65 (Me. 1981).

[22] W.C. Banks, Inc. v. Team, Inc., 783 S.W.2d 783 (Tex. App. Houston 1st Dist. 1990).

End of Document

46 Am. Jur. 2d Judges § 32

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

B. Successor Judges

§ 32. Successor judge entering judgment or rendering decision—By stipulation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 32

A.L.R. Library

Power of Successor or Substituted Judge, in Civil Case, to Render Decision or Enter Judgment on Testimony Heard by Predecessor, 84 A.L.R.5th 399

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747

The parties to an action may agree or stipulate that the action may be decided by a successor judge upon the successor's reading and consideration of the record of evidence taken upon trial of the cause before the predecessor.[1]

Where the recitals in the judgment state that the case has been assigned to the successor judge for decision, that neither party has objected to its disposition by the successor judge, and that the issue has been submitted to the successor judge, the decision of the successor judge on motions for directed verdict has the same force and effect as the decision by the trial judge would have had, including whatever determinations on questions of fact were involved in the conclusion.[2]

Footnotes

[1] Milbrew, Inc. v. C.I.R., 710 F.2d 1302 (7th Cir. 1983); Christy v. Christy, 354 S.C. 203, 580 S.E.2d 444 (2003).

[2] Thomas-Bonner Co. v. Hooven, Owens & Rentschler Co., 284 F. 386 (C.C.A. 6th Cir. 1922).
As to federal judges, generally, see Am. Jur. 2d, Federal Courts §§ 1 et seq.

End of Document

46 Am. Jur. 2d Judges § 33

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

B. Successor Judges

§ 33. Successor judge changing findings of fact and conclusions of law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 32

A.L.R. Library

Power of Successor or Substituted Judge, in Civil Case, to Render Decision or Enter Judgment on Testimony Heard by Predecessor, 84 A.L.R.5th 399

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747

Allowing a successor judge to vacate and annul a finding of fact made by the trial judge is generally considered improper, because it would permit the successor to grant a new trial.[1] In cases tried without a jury, a party litigant is entitled to a decision on the facts by a judge who heard and saw the witnesses, and a deprivation of that right constitutes a denial of due process.[2] However, where the successor judge is not required to weigh conflicting evidence or determine the credibility of witnesses, but can resolve the issues on questions of law, or on evidence not in conflict, the successor does not exceed the successor's authority or abuse discretion by exercising the same authority as could the judge who tried the case.[3] A successor judge did not abuse discretion by revising a recused judge's interlocutory findings to correspond with the successor judge's findings in an earlier case involving substantially similar facts where, for ERISA purposes, the retiree concessions at issue in the case at bar and those at issue in the earlier case were materially the same, so that the two cases involved substantially similar facts.[4]

Where nothing remains to be accomplished but the entry of the judgment, the successor of the judge who tried the case may make changes in the conclusions of law upon the facts found.[5]

Footnotes

[1] Pratt v. Gerber, 330 So. 2d 552 (Fla. 3d DCA 1976); State ex rel. Harp v. Vanderburgh Circuit Court, 227 Ind. 353, 85 N.E.2d 254, 11 A.L.R.2d 1108 (1949).

[2] Paulson v. Meinke, 352 N.W.2d 191 (N.D. 1984).

[3] Exxon Corp. v. U.S., 931 F.2d 874 (Fed. Cir. 1991).

[4] Stoffels ex rel. SBC Telephone Concession Plan v. SBC Communications, Inc., 677 F.3d 720, 82 Fed. R. Serv. 3d 631 (5th Cir. 2012).

[5] Anderson v. Dewey, 82 Idaho 173, 350 P.2d 734 (1960).

End of Document

46 Am. Jur. 2d Judges § 34

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

B. Successor Judges

§ 34. Successor judge vacating judgment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 32

A.L.R. Library

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747

A successor judge who takes office during the duration of the predecessor's term does not have the authority to vacate a judgment entered by the predecessor.[1] A successor judge cannot on unchanged facts enter an order vacating a final decree of a predecessor judge, since a successor judge may not correct errors of law committed by the predecessor.[2] However, a successor judge may vacate a judgment entered by the predecessor where new matter introduced before the successor judge indicates that an injustice has been done.[3]

The rule in most federal courts is that where a federal district judge, while a case is on the judge's calendar, has rendered a decision and makes a judicial order in the case, another judge of the same district court, to whom the case is thereafter transferred, should respect and not overrule such decision and order.[4]

Under a statute prescribing a fixed period of time within which a judgment may be vacated, the power to vacate the judgment of a prior judge may be validly exercised within the statutory period by a successor judge, or even by another judge of the same court.[5]

Footnotes

1 State ex rel. Harp v. Vanderburgh Circuit Court, 227 Ind. 353, 85 N.E.2d 254, 11 A.L.R.2d 1108 (1949).

2 Able Outdoor, Inc. v. Harrelson, 341 N.C. 167, 459 S.E.2d 626 (1995).

3 Greene v. State Farm Fire & Casualty Co., 224 Cal. App. 3d 1583, 274 Cal. Rptr. 736 (1st Dist. 1990).

4 Stevenson v. Four Winds Travel, Inc., 462 F.2d 899, 20 A.L.R. Fed. 1 (5th Cir. 1972).

5 Department of Public Works and Buildings v. Legg, 374 Ill. 306, 29 N.E.2d 515 (1940).

End of Document

46 Am. Jur. 2d Judges § 35

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

B. Successor Judges

§ 35. Retrial of case by successor judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 32

Whether to retry a case tried by a predecessor judge whose decision was not formalized by a journal entry is within the discretion of the successor judge.[1] A successor judge has not only the authority but also in some jurisdictions the duty to retry a case that the predecessor heard but did not decide; in other jurisdictions, the successor judge may decide the case on the record of the evidence after hearing the argument and without taking further testimony.[2]

A party is entitled to a determination of the issues by the judge who heard the evidence, and, where a case is tried to a judge who resigns before determining the issues, a successor judge cannot decide the issues or enter findings without a trial de novo.[3] Thus, due process required a successor judge, assigned after the original judge retired, to hold a new evidentiary hearing on remand in a workers' compensation action to consider conflicting evidence as to whether a presumption of correctness afforded to the vocational rehabilitation specialist's opinion of claimant's disability had been rebutted, and whether the claimant was totally and permanently disabled; the witnesses' credibility was at issue, and the parties did not consent to the procedure.[4]

Footnotes

1 Golf City, Inc. v. Wilson Sporting Goods, Co., Inc., 555 F.2d 426, 23 Fed. R. Serv. 2d 1176 (5th Cir. 1977).

2 § 31.

3 In re S.B., 5 N.E.3d 1152 (Ind. 2014).

4 Liljestrand v. Dell Enterprises, Inc., 287 Neb. 242, 842 N.W.2d 575 (2014).

End of Document

46 Am. Jur. 2d Judges V C Refs.

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

C. Reconsidering Rulings by Another Judge

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 24, 32

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 24, 32

End of Document

46 Am. Jur. 2d Judges § 36

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

C. Reconsidering Rulings by Another Judge

§ 36. Reconsideration of predecessor judge's ruling, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 24, 32

A.L.R. Library

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747

Some jurisdictions follow the view that a judge does not have the power to vacate, modify, or depart from an interlocutory order or ruling made in the same case by another judge with equal powers,[1] unless new circumstances justify a fresh examination.[2] Other jurisdictions, however, recognize that a trial judge does have this power, regardless of the circumstances.[3] When an issue is once judicially determined, that should be the end of the matter as far as successive judges sitting in the same case are concerned; however, this rule is not an imperative, does not go to the power of the court and it does not necessarily mandate that a court does not have discretion, in appropriate circumstances, to reconsider a ruling made by another judge in the same case.[4]

Although a trial judge who succeeds a prior trial judge in a case while the case is still in the trial court may generally reconsider a decision made by the prior judge without violating the law of the case doctrine, that freedom is not available where the prior judge's decision has been affirmed on appeal.[5]

A judge acting later in a case is, at most, bound only by the actual order or ruling announced by an earlier judge and not by the doctrine announced by the earlier judge in connection with the order or ruling.[6]

Footnotes

[1] Jones v. Rivera, 2005 PA Super 17, 866 A.2d 1148 (2005).

[2] Herczeg v. Hampton Tp. Mun. Authority, 2001 PA Super 10, 766 A.2d 866 (2001).
As to the effect of a change of circumstances on a judge's power to reconsider another judge's ruling, generally, see § 38.

[3] Riley v. Presnell, 409 Mass. 239, 565 N.E.2d 780 (1991).
The power of one judge to vacate an order made by another judge is limited. Alvarez v. Superior Court, 183 Cal. App. 4th 969, 107 Cal. Rptr. 3d 671 (1st Dist. 2010).
One circuit court judge may not overrule another. Salmonsen v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81 (2008).

[4] Teamsters Union Local No. 2, International Brotherhood of Teamsters, Plaintiff, Appellee, and Cross-Appellant v. C.N.H. Acquisitions, Inc., 2009 MT 92, 350 Mont. 18, 204 P.3d 733 (2009).

[5] Barber v. State, Department of Corrections, 393 P.3d 412 (Alaska 2017).

[6] Happ v. Lockett, 543 So. 2d 1281 (Fla. 5th DCA 1989).

End of Document

46 Am. Jur. 2d Judges § 37

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

C. Reconsidering Rulings by Another Judge

§ 37. Effect of existence or absence of right to appeal on reconsideration of predecessor judge's ruling

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 24, 32

A.L.R. Library

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747

The fact that the order of the first judge to take action in a case is appealable may be considered in determining whether the same question may be properly be ruled on anew by another judge of the trial court.[1] There is authority for the view that where a ruling is immediately appealable, rather than interlocutory in nature, review of the order by a different judge is improper.[2] Conversely, where the second judge is deemed not to be precluded from reconsidering a point ruled upon by the first, weight may be given to the fact that the order of the first judge is not appealable.[3]

Footnotes

1 State v. Standard Oil Co. of New Jersey, 205 N.C. 123, 170 S.E. 134 (1933).

2 Cruz v. Columbus-Cuneo-Cabrini Medical Center, 194 Ill. App. 3d 1037, 141 Ill. Dec. 817, 551 N.E.2d 1345 (1st Dist. 1990).

3 Weil v. Weil, 299 S.C. 84, 382 S.E.2d 471 (Ct. App. 1989).

End of Document

46 Am. Jur. 2d Judges § 38

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

C. Reconsidering Rulings by Another Judge

§ 38. Effect of change of circumstances or additional facts on reconsideration of predecessor judge's ruling

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 24, 32

A.L.R. Library

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747

A judge may properly reconsider a question that has been ruled upon by another judge in the same case where there has been a change of circumstances or additional facts which would warrant such action.[1] Generally, the new matter may be new evidence,[2] new and substantially different pleadings,[3] or any matter by which the record is essentially changed.[4] However, there is authority to allow a more expansive right.[5]

Footnotes

1 Rosenberg v. Otis Elevator Co., 366 N.J. Super. 292, 841 A.2d 99 (App. Div. 2004).

2 Alvarez v. Superior Court, 117 Cal. App. 4th 1107, 12 Cal. Rptr. 3d 252 (2d Dist. 2004).

3 Bowman v. Board of Regents of Universities and State Colleges of Arizona, 162 Ariz. 551, 785 P.2d 71, 58 Ed. Law Rep. 312 (Ct. App. Div. 1 1989).

4 Harry v. Lehigh Valley Hosp., 2003 PA Super 209, 825 A.2d 1281 (2003).

[5] Kuwaiti Danish Computer Co. v. Digital Equipment Corp., 438 Mass. 459, 781 N.E.2d 787, 49 U.C.C. Rep. Serv. 2d 729 (2003).

End of Document

46 Am. Jur. 2d Judges § 39

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

C. Reconsidering Rulings by Another Judge

§ 39. Effect of unavailability of first judge on reconsideration of ruling

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 24, 32

A.L.R. Library

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747

If the judge who made the first ruling is deceased or otherwise out of office, or the circumstances are such that it is not feasible to apply to the judge for a vacation or modification of the ruling, another judge of the same court may properly vacate or modify such ruling or depart from it in a new ruling.[1]

Footnotes

[1] Geddes v. Superior Court, 126 Cal. App. 4th 417, 23 Cal. Rptr. 3d 857 (2d Dist. 2005).

46 Am. Jur. 2d Judges § 40

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

C. Reconsidering Rulings by Another Judge

§ 40. Reconsideration of predecessor judge's rulings on questions of law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 24, 32

Generally, a judge may, in a proper case, vacate, modify, or depart from an interlocutory order or ruling of another judge in the same case upon a question of law; the orders that may be affected include an order allowing or denying intervention,[1] a ruling on the admissibility of evidence,[2] or a ruling on the sufficiency or effect of pleadings.[3]

Some jurisdictions follow the view that a question of law that has been taken by one judge in ruling on the pleadings is not to be departed from by another.[4] Although there is authority in support of the view that it is improper for one judge to order stricken from a pleading an allegation that another has ordered or permitted to be added,[5] there is also authority for the view that a trial judge is not required to admit proof of immaterial or irrelevant allegations added to or retained in a pleading under the order of another judge.[6] A question of law that has been ruled upon by one judge on a demurrer or motion attacking pleadings may not be reconsidered by another on a second similar demurrer or motion attacking substantially the same pleadings.[7] The successor judge may also be bound by the decision of the predecessor as to an order allowing intervention[8] and an order granting a jury trial.[9]

Footnotes

1 German v. Universal Oil Products Co., 77 F.2d 70 (C.C.A. 8th Cir. 1935); City of Bridgeport v. Triple 9 of Broad Street, Inc., 87 Conn. App. 735, 867 A.2d 851 (2005).

2 Salem Trust Co. v. Federal Nat. Bank, 78 F.2d 407 (C.C.A. 1st Cir. 1935).

3 Schaffran v. Mt. Vernon-Woodberry Mills, 70 F.2d 963, 94 A.L.R. 543 (C.C.A. 3d Cir. 1934).
A successor may change a predecessor's rulings of law involving the overruling of demurrers and motions to strike pleadings. Tube City Min. & Mill. Co. v. Otterson, 16 Ariz. 305, 146 P. 203 (1914).
A second judge may permit allegations to be added to a pleading notwithstanding the first judge having ordered similar allegations stricken therefrom. Madden v. Glathart, 115 Kan. 796, 224 P. 910 (1924).

[4] Henry v. New York Post, 168 Misc. 247, 5 N.Y.S.2d 716 (Sup 1938), judgment aff'd, 255 A.D. 973, 8 N.Y.S.2d 1022 (1st Dep't 1938), judgment aff'd, 280 N.Y. 842, 21 N.E.2d 887 (1939).

[5] Hardin v. Greene, 164 N.C. 99, 80 S.E. 413 (1913).

[6] Munro v. Post, 102 F.2d 686 (C.C.A. 2d Cir. 1939); Givens v. North Augusta Elec. & Imp. Co., 91 S.C. 417, 74 S.E. 1067 (1912).

[7] Galloway v. Mitchell County Elec. Membership Corp., 190 Ga. 428, 9 S.E.2d 903 (1940).

[8] Baltimore Trust Co. v. Norton Coal Mining Co., 25 F. Supp. 968 (W.D. Ky. 1939).

[9] Second Nat. Bank of Malden v. Leary, 284 Mass. 321, 187 N.E. 611 (1933).

End of Document

46 Am. Jur. 2d Judges § 41

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

V. Powers and Duties

C. Reconsidering Rulings by Another Judge

§ 41. Administrative or discretionary orders of court

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 24, 32

Despite the general rule that one judge will not review the rulings of another in the same court, this rule was intended to apply to orders and rulings of the court which are purely judicial in their character, that is to say, rulings upon questions of law and fact, upon which the orderly procedure of the case depends; the rule does not apply to purely administrative orders of the court.[1] However, a judge should not ordinarily interfere with or depart from an interlocutory order or ruling of another judge that involved a large element of judicial discretion,[2] unless there has been a change of circumstances.[3]

Footnotes

1 In re Insull Utility Investments, 74 F.2d 510 (C.C.A. 7th Cir. 1935); Mendez ex rel. Bennett v. Sharpe, 93 Misc. 2d 776, 403 N.Y.S.2d 868 (Sup 1978).

2 Thomas v. Johnson Controls, Inc., 344 Ill. App. 3d 1026, 279 Ill. Dec. 798, 801 N.E.2d 90 (1st Dist. 2003).

3 Iverson v. TM One, Inc., 92 N.C. App. 161, 374 S.E.2d 160 (1988).

End of Document

46 Am. Jur. 2d Judges VI A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VI. Privileges, Exemptions, and Disabilities

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 20, 21

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 20, 21

End of Document

46 Am. Jur. 2d Judges § 42

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VI. Privileges, Exemptions, and Disabilities

A. In General

§ 42. Privileges and exemptions of judges, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 20, 21

A.L.R. Library

Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness, 82 A.L.R.4th 567

Because of the nature of the office, the judge is granted certain special privileges and exemptions; generally, a judge is exempt from liability for judicial acts,[1] and under certain circumstances a judge is exempt from arrest[2] and from the service of civil process.[3] In some jurisdictions, a judge may be disbarred for unauthorized practice of law, although there is authority to the contrary.[4]

A judge, under certain circumstances, may be disciplined for conduct unbecoming a member of the judiciary; such conduct may be proved by evidence of specific major incidents or by evidence of an accumulation of small, ostensibly innocuous incidents, which, when considered together, emerge as a pattern of hostile conduct unbecoming a member of the judiciary.[5]

The peculiar nature of judicial office imposes certain restrictions and limitations on a judge with respect to the extent to which the judge may engage in the ordinary activities and associations of citizens; a judge should refrain from activities and associations that would tend to impair the judge's independence of judgment or render the judge subject to improper influence in the performance of official duties.[6] A canon of a state code of judicial conduct prohibiting judges from serving on boards of directors of banks and other financial institutions does not unconstitutionally infringe upon judges' First Amendment freedom of association and is not so arbitrary and unreasonable as to violate substantive and procedural due process and equal protection guarantees.[7] For instance, a judicial ethics rule prohibited a family court judge from serving on an advisory board of a financial institution; the judge's position on the bank's advisory board unquestionably served to lend the prestige of the judicial office to a private financial institution, the bank would likely have some interest in the outcome of

family court proceedings by virtue of being a repository of funds or a holder of debt of family court litigants, and any arbitrary distinction between circuit judges exercising general jurisdiction and circuit judges exercising family court jurisdiction would have resulted in an impermissible and arbitrary division.[8] A judge may not be a purchaser at a sale in connection with which the judge, or the court over which the judge presides, has some duty to perform.[9] However, a judge may serve as a member of a state bar without violating a statute prohibiting a judge from belonging to an "organization engaged in political activity."[10]

Speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection; however, judicial candidates may be treated differently than political candidates for purposes of curtailing improper speech, as judges are not politicians, even when they come to the bench by way of the ballot, and a state's decision to elect its judiciary does not compel it to treat judicial candidates like a campaigner for political office.[11] Because the First Amendment reviles restrictions on core political speech, restrictions on the speech of judicial candidates in judicial elections are subject to the strict scrutiny standard; under the strict scrutiny standard, a state may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.[12] Under the First Amendment and judicial canons requiring that judges be elected from their respective districts or circuits on a nonpartisan basis, judicial candidates may "affiliate," that is "portray" themselves as members of a political party without restriction; what they may not do under the judicial canons is portray themselves, either directly or by implication, as the official nominee of a political party.[13] When an incumbent judge uses the word "reelect" as a campaign stratagem to persuade the public that the judge acquired the office by the popular vote of the people rather than as the appointee of a governor, its use is calculated to mislead and deceive the voters, in violation of a judicial canon stating that a judge or judicial candidate may not knowingly, or with reckless disregard for the truth, misrepresent any candidate's identity, qualifications, present position, or make any other false or misleading statements.[14] Similarly, a judicial candidate's statement in a campaign flyer, that the President of the United States and an opposing judicial candidate had a "party" at the White House in support of the President's legislative agenda while a state county lost hundreds of jobs, was not objectively or substantially true, and thus the code of judicial conduct rule and rule of professional conduct prohibiting knowingly making false statements during a judicial campaign or about judicial candidates did not violate the First Amendment free-speech protections as applied to the candidate; the substance of the communication, taken as a whole, was patently false, as the truth was that the opposing candidate merely attended a federally required meeting and seminar that took place on the White House grounds, and the flyer conveyed that the opposing candidate had socialized with the President.[15]

Footnotes

1 §§ 61 to 79.

2 Am. Jur. 2d, Arrest § 111.

3 Am. Jur. 2d, Process § 16.

4 § 46.

5 In re Kinsey, 842 So. 2d 77 (Fla. 2003); In re Inquiry Concerning a Judge, James S. Byrd, No. 84-73, 460 So. 2d 377 (Fla. 1984); In re Lee, 336 So. 2d 1175 (Fla. 1976).

6 Estate of Sheen, 145 Misc. 2d 920, 548 N.Y.S.2d 618 (Sur. Ct. 1989); Matter of Disciplinary Proceedings Against Costello, 142 Wis. 2d 926, 419 N.W.2d 706 (1988).

7 Babineaux v. Judiciary Commission, 341 So. 2d 396 (La. 1976).
As to political activity of judges, generally, see § 45.

8 Walson v. Ethics Committee of Kentucky Judiciary, 308 S.W.3d 205 (Ky. 2010).

9 Am. Jur. 2d, Executions and Enforcement of Judgments § 331.

10 In re Greenwood, 796 P.2d 682 (Utah 1990).

11 Matter of Callaghan, 238 W. Va. 495, 796 S.E.2d 604 (2017), petition for certiorari filed (U.S. July 10, 2017).

12 Winter v. Wolnitzek, 482 S.W.3d 768 (Ky. 2016).

13 Winter v. Wolnitzek, 482 S.W.3d 768 (Ky. 2016).

14 Winter v. Wolnitzek, 482 S.W.3d 768 (Ky. 2016).

15 Matter of Callaghan, 238 W. Va. 495, 796 S.E.2d 604 (2017), petition for certiorari filed (U.S. July 10, 2017).

End of Document

46 Am. Jur. 2d Judges § 43

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VI. Privileges, Exemptions, and Disabilities

A. In General

§ 43. Judge holding other office

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 20, 21

At common law a judge cannot hold another office where the two offices are incompatible or, in other words, where their functions are inconsistent.[1] The constitutions or statutes of some states, in somewhat varying terms, expressly prohibit judges from holding any other office.[2] Statutes or constitutional provisions may also specifically prohibit judges from holding elective nonjudicial public offices,[3] or from becoming candidates for elective office.[4] Constitutional provisions prohibiting the exercise of the functions of one of the several departments of government by an officer of either of the others may prevent a judge from holding any other state office.[5]

The purpose of such prohibitory provisions is to exclude judicial officers from such extrajudicial activities as may tend to militate against the free, disinterested, and impartial exercise of their judicial function; the fact that no compensation is attached to the other office or employment does not take it out of the operation of a prohibition against holding another public office.[6] Under statute in at least one jurisdiction, a state judge must resign from the judicial position upon nomination for any public office other than the judgeship or automatically forfeit such judicial post.[7] A resign-to-run provision of the code of judicial conduct, requiring a judge to resign from judicial office upon becoming a candidate for an elective office, did not block an assistant judge's ability to express political views by running for office, so as to violate the judge's First Amendment rights; the state supreme court had a substantial interest in protecting the fairness, and perceived fairness, of judicial decision-making and minimizing the distraction of election campaigns.[8] Thus, an assistant judge violated the resign-to-run provision of the code of judicial conduct by becoming a candidate for probate judge without first resigning an assistant judge position; the provision unambiguously required the judge to resign from judicial office upon becoming a candidate for any elective office, not any nonjudicial elective office, and the provision did not lead to absurd results, since the public was entitled to require that assistant and probate judges devote their entire attention to the office to which they were elected.[9]

"Holding any office" in a political organization, under a judicial canon stating that a judge or judicial candidate may not act as a leader or hold any office in a political organization, means occupying a formal position with a recognized title or performing a function within the established organizational structure of an association whose principal purpose is to further the election or appointment of candidates to political office; an "office" in such an organization includes recognized titles

such as chairman, director, secretary, treasurer, press secretary, precinct leader, membership recruiter, youth coordinator, and the like.[10] "Acting as a leader," in a political organization, under a judicial canon stating that a judicial candidate may not act as a leader or hold any office in a political organization, captures efforts to advance the political agenda of the party through proactive planning, organizing, directing, and controlling of party functions with the goal of achieving success for the political party; these leader-without-title positions would include acting formally or informally as a party spokesperson, organizing, managing, or recruiting new members, organizing or managing campaigns, fundraising, and performing other roles exerting influence or authority over the rank and file membership albeit without a formal title, including hosting political events.[11]

CUMULATIVE SUPPLEMENT

Cases:

Application by city's public advocate, pursuant to provision of the Charter of the City of New York allowing for a summary inquiry into any alleged violation or neglect of duty by a city official, to have city department of education and its former chancellor appear for a judicial summary inquiry concerning a contract for a computer software system that was ostensibly designed to manage special education service records did not violate state constitution's prohibition on Supreme Court justices holding any other public office or trust; a judicial summary inquiry controlled by a Supreme Court justice had all the hallmarks of a grand jury proceeding, which was a quintessential judicial proceeding. N.Y. Const. art. 6, § 20. James v. Farina, 171 A.D.3d 44, 96 N.Y.S.3d 220, 364 Ed. Law Rep. 1137 (1st Dep't 2019).

[END OF SUPPLEMENT]

Footnotes

1 State ex rel. Murphy v. Townsend, 72 Ark. 180, 79 S.W. 782 (1904); Howard v. Harrington, 114 Me. 443, 96 A. 769 (1916).
As to incompatibility of office, generally, see Am. Jur. 2d, Public Officers and Employees §§ 62 to 67.

2 People v. Larry C., 286 Cal. Rptr. 52 (App. 3d Dist. 1991); Wagner v. Milwaukee County Election Com'n, 2003 WI 103, 263 Wis. 2d 709, 666 N.W.2d 816 (2003).

3 In re Greenwood, 796 P.2d 682 (Utah 1990).

4 Fonte v. Ansardi, 493 So. 2d 1206 (La. 1986).

5 State ex rel. Van Antwerp v. Hogan, 283 Ala. 445, 218 So. 2d 258 (1969).

6 Abbott v. McNutt, 218 Cal. 225, 22 P.2d 510, 89 A.L.R. 1109 (1933).

7 Signorelli v. Evans, 637 F.2d 853 (2d Cir. 1980); In re Schamel, 46 A.D.2d 236, 362 N.Y.S.2d 39 (3d Dep't 1974).

8 In re Hodgdon, 189 Vt. 265, 2011 VT 19, 19 A.3d 598 (2011).

9 In re Hodgdon, 189 Vt. 265, 2011 VT 19, 19 A.3d 598 (2011).

10 Winter v. Wolnitzek, 482 S.W.3d 768 (Ky. 2016).

11 Winter v. Wolnitzek, 482 S.W.3d 768 (Ky. 2016).

End of Document

46 Am. Jur. 2d Judges § 44

American Jurisprudence, Second Edition | May 2021 Update

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VI. Privileges, Exemptions, and Disabilities

A. In General

§ 44. Judge holding other office—As effecting vacation of office

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 20, 21

The acceptance by a judge of an incompatible office constitutes a vacation of the office of judge, ending the incumbent's judicial authority.[1] Similarly, a person holding another incompatible office who accepts the office of judge thereby vacates the other office.[2]

Footnotes

1 Caldwell v. Lyon, 168 Tenn. 607, 80 S.W.2d 80, 100 A.L.R. 1152 (1935); State v. Jones, 130 Wis. 572, 110 N.W. 431 (1907).

2 State ex rel. Van Antwerp v. Hogan, 283 Ala. 445, 218 So. 2d 258 (1969); Caldwell v. Lyon, 168 Tenn. 607, 80 S.W.2d 80, 100 A.L.R. 1152 (1935).

46 Am. Jur. 2d Judges § 45

American Jurisprudence, Second Edition | May 2021 Update

Judges
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VI. Privileges, Exemptions, and Disabilities

A. In General

§ 45. Political activity of judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 20, 21

A.L.R. Library

Election campaign activities as ground for disciplining attorney, 26 A.L.R.4th 170

It is highly improper for a judge or a candidate for a judicial position to serve upon party committees or make partisan speeches.[1] Although statutes which prohibit judges from actively participating in politics by making political speeches, or actively or officially participating in political meetings, violate the constitutional guaranty of freedom of speech,[2] a prohibition in the code of judicial conduct against a judge or judicial candidate personally soliciting campaign funds complies with the First Amendment.[3]

A state's judicial conduct rule, prohibiting judicial candidates from personally soliciting campaign funds, was narrowly tailored to the state's asserted compelling interests for regulating speech, i.e., protecting the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary; a narrow slice of speech was restricted, the rule left judicial candidates free to discuss any issue with any person at any time, and while judicial candidates could not say, "Please give me money," they could direct their campaign committees to do so.[4] For purposes of First Amendment analysis, a canon of judicial ethics prohibiting judicial candidates from personally soliciting campaign contributions was narrowly tailored to serve compelling state interests in preserving the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary; the restriction of the right of judges to engage in political activity protected the independence of the judiciary, and the canon permitted judges to solicit campaign funds through a separate campaign committee, insulating judges from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run campaigns.[5] Likewise, a code of judicial conduct rule prohibiting judicial candidates from personally soliciting campaign contributions except in writing or when speaking to groups of 20 or more individuals was narrowly tailored to advance a compelling state interest in protecting donors from coercion, as required for the rule to overcome a

free-speech facial challenge under the First Amendment, where the prohibition of one-on-one solicitation was the least restrictive means of advancing the state's interest in preventing coercion resulting from the intimacy of in-person solicitation.[6] A supreme court rule prohibiting candidates for judicial office from personally soliciting or accepting campaign contributions is constitutional as applied to judicial candidates, even if they are not sitting judges.[7]

A part-time municipal court judge whose law partner made political contributions from the firm's joint business account did not violate a canon of the code of judicial conduct prohibiting a judge from making a contribution to a political organization or candidate, even though circumstances created an undeniable appearance that the judge shared responsibility for the contributions, where the judge had orally instructed the partner and staff not to issue any more political contributions, and the judge's partner acknowledged that the partner was responsible for all of the political contributions made.[8]

A code of judicial conduct rule, prohibiting a judge from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, expressly applied to only "a judge," and thus, a judicial candidate's statement in a voters' pamphlet, suggesting that a trial academy the candidate attended at Stanford Law School was affiliated with the school, did not violate the rule.[9] However, even if a judicial candidate's statement in a voters' pamphlet qualified as a "false statement" for purposes of the code of judicial conduct rule, prohibiting a judicial candidate from knowingly or with reckless disregard for the truth making any false statement, there was not clear and convincing evidence that the candidate acted with the requisite mental state in making the statement supporting the party's judicial candidacy, as would establish a violation of the rule.[10]

CUMULATIVE SUPPLEMENT

Cases:

Judge violated Judicial Conduct Rule providing that a judge or judicial candidate shall not seek, accept, or use endorsements from a political organization, or partisan or independent non-judicial office-holder or candidate, where judge's social media page contained endorsements from two partisan candidates and a political organization, and judge endorsed two partisan candidates for non-judicial offices. Mont. Code of Jud. Conduct, Rule 4.1(A)(7). Halverson v. Harada, 2020 MT 89, 461 P.3d 869 (Mont. 2020).

[END OF SUPPLEMENT]

Footnotes

1 In re Charges of Judicial Misconduct, 404 F.3d 688 (2d Cir. Jud. Council 2005); Matter of Katic, 549 N.E.2d 1039 (Ind. 1990); In re Fadeley, 310 Or. 548, 802 P.2d 31 (1990).

2 Matter of Disciplinary Proceeding Against Blauvelt, 115 Wash. 2d 735, 801 P.2d 235 (1990).

3 In re Fadeley, 310 Or. 548, 802 P.2d 31 (1990).

4 Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015).

5 The Florida Bar v. Williams-Yulee, 138 So. 3d 379 (Fla. 2014).

6 Ohio Council 8 American Federation of State, County, and Mun. Employees, AFL-CIO v. Brunner, 912 F. Supp. 2d 556 (S.D. Ohio 2012).

7 Winnig v. Sellen, 731 F. Supp. 2d 855 (W.D. Wis. 2010) (Wisconsin rule).

8 In re Boggia, 203 N.J. 1, 998 A.2d 949 (2010).

[9] In re Miller, 358 Or. 741, 370 P.3d 1241 (2016).

[10] In re Miller, 358 Or. 741, 370 P.3d 1241 (2016).

End of Document

46 Am. Jur. 2d Judges VI B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Judges
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VI. Privileges, Exemptions, and Disabilities

B. Practice of Law

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 20, 21

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 20, 21

End of Document

46 Am. Jur. 2d Judges § 46

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VI. Privileges, Exemptions, and Disabilities

B. Practice of Law

§ 46. Prohibition against judge's practice of law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 20, 21

A.L.R. Library

Propriety and permissibility of judge engaging in practice of law, 89 A.L.R.2d 886

Forms

Forms relating to termination or withdrawal of attorney due to judgeship, generally, see Am. Jur. Legal Forms 2d, Judges [Westlaw®(r) Search Query]

Usually, by virtue of a statutory provision[1] or a rule of court,[2] a judge of a court of record is prohibited from practicing law. The bar against the practice of law by judges may exist even in the absence of statute.[3] The bar extends to the practice of law in or out of court, directly or indirectly.[4] However, a state court judge has a constitutional right under the Sixth Amendment to represent himself in a criminal proceeding.[5]

Statutes which prohibit retired judges from practicing law in federal courts, in order to receive retirement benefits, violate due process.[6]

A judge may engage in the practice of law without violating the code of judicial conduct where, although the judge has received a commission, the judge has not yet taken the oath of office,[7] or where the prohibition applied only to full-time

judges and thus the statute authorizing per diem judges to practice law did not violate the constitution.[8] However, the actions of a county judge in agreeing to represent a criminal client, signing a contract for representation with the client and the client's father, interviewing the client, arranging for substitute counsel to appear on the judge's behalf at the client's bond hearing, attending such hearing, and obtaining papers necessary to secure bond at the conclusion of the hearing, all occurring prior to the expiration of the judge's term of judicial office, amounted to the unauthorized practice of law while still a judge, in violation of the code of judicial conduct.[9]

Observation:

A judge's conduct in including a link to the website of the judge's private law office on the judge's personal website that was used during the judge's election campaign did not violate the code of judicial conduct canon that prohibited a judge from using the prestige of judicial office to advance the private interests of the judge; as part-time probate court judges such as the judge were allowed to maintain a private law practice, the judge provided the link to the website of the private law office for the purposes of eliminating confusion within the general public and preventing instances where a person who wanted to contact the judge in his capacity as a lawyer mistakenly contacted the probate court.[10]

Footnotes

1 28 U.S.C.A. § 454.

2 Collins v. Godfrey, 324 Mass. 574, 87 N.E.2d 838 (1949).

3 In re Sisemore, 271 Or. 743, 534 P.2d 167 (1975).

4 Bassi v. Langloss, 22 Ill. 2d 190, 174 N.E.2d 682, 89 A.L.R.2d 881 (1961).

5 U.S. v. Martinez, 1984-NMSC-072, 101 N.M. 423, 684 P.2d 509 (1984).

6 State v. McMillan, 253 Ga. 154, 319 S.E.2d 1 (1984).

7 Reed v. Sloan, 25 Pa. Commw. 570, 360 A.2d 767 (1976), judgment aff'd, 475 Pa. 570, 381 A.2d 421 (1977).

8 Application of Ferguson, 74 Haw. 394, 846 P.2d 894 (1993).

9 In re Henson, 913 So. 2d 579 (Fla. 2005).

10 In re Nadeau, 2016 ME 116, 144 A.3d 1161 (Me. 2016).

End of Document

46 Am. Jur. 2d Judges § 47

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VI. Privileges, Exemptions, and Disabilities

B. Practice of Law

§ 47. Restriction of judge's right to practice law

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 20, 21

A.L.R. Library

Propriety and permissibility of judge engaging in practice of law, 89 A.L.R.2d 886

Statutes in some jurisdictions merely restrict the right of a judge to practice, without prohibiting a judge absolutely from doing so; the judge may be limited by a restriction on practice in the court of which the judge is a member,[1] or on practice as to matters that may come before the judge for decision,[2] or that might come before the judge in the party's judicial capacity in the future.[3] In some courts, a judge is disqualified only as to matters pending or originating in that court during the judge's term of office.[4]

Footnotes

1 Carlson v. City of Bozeman, 2001 MT 46, 304 Mont. 277, 20 P.3d 792 (2001); Plaistow Bank & Trust Co. v. Webster, 121 N.H. 751, 433 A.2d 1332 (1981).

2 In re Kenton County Bar Ass'n, 314 Ky. 664, 236 S.W.2d 906 (1951).

3 Prichard v. U.S., 181 F.2d 326 (6th Cir. 1950), judgment aff'd, 339 U.S. 974, 70 S. Ct. 1029, 94 L. Ed. 1380 (1950); Davis v. Sexton, 211 Va. 410, 177 S.E.2d 524 (1970).

4 Brazzell v. Maxwell, 176 Ohio St. 408, 27 Ohio Op. 2d 378, 200 N.E.2d 309 (1964).

End of Document

46 Am. Jur. 2d Judges § 48

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VI. Privileges, Exemptions, and Disabilities

B. Practice of Law

§ 48. Practice of law by judges having relatively light duties

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 20, 21

A.L.R. Library

Propriety and permissibility of judge engaging in practice of law, 89 A.L.R.2d 886

It is for a statute to distinguish between a judge's right to practice law where the judge's duties to the court consume all the judge's time and where they are relatively light and permit opportunities for other activities on the judge's part without detriment to the judge's public service.[1]

A special, substitute, acting, or pro tem judge of a court is generally not barred from the practice of law in the court,[2] except, in some jurisdictions, as to matters pending or originating in the court in which the judge served during the judge's term of office.[3] At least one jurisdiction distinguishes between a judge pro tempore having a continuing appointment with more or less permanent tenure of office and one whose appointment is limited to a particular trial or a short period of time; the former may not practice in the court until a reasonable time after such judge has served a connection with it; the latter is not precluded from practice in the court after the time at which the appointment expires.[4]

Footnotes

[1] Connecticut Mut. Life Ins. Co. v. Most, 39 Cal. App. 2d 634, 103 P.2d 1013 (3d Dist. 1940); Reynolds v. Chumbley, 175 Tenn. 492, 135 S.W.2d 939 (1940).

[2] Connecticut Mut. Life Ins. Co. v. Most, 39 Cal. App. 2d 634, 103 P.2d 1013 (3d Dist. 1940); Schuster v. Raflowitz,

245 A.D. 248, 281 N.Y.S. 379 (3d Dep't 1935).

[3] Thomas v. Maxwell, 175 Ohio St. 233, 24 Ohio Op. 2d 344, 193 N.E.2d 150 (1963).
As to special and pro tem judges, generally, see §§ 232 to 252.

[4] In re Kenton County Bar Ass'n, 314 Ky. 664, 236 S.W.2d 906 (1951).

End of Document

46 Am. Jur. 2d Judges § 49

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VI. Privileges, Exemptions, and Disabilities

B. Practice of Law

§ 49. Practice of law by judge after resignation or retirement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 20, 21

A former judge is not barred from the practice of law after the judge has resigned or left the bench.[1] Generally, a judge retired for disability on half pay is not precluded from practicing law except in cases involving matters on which the judge had acted while holding office.[2] A judge who has retired and is receiving retirement compensation may be forbidden by statute from engaging in the practice of law,[3] although such a judge who receives a state pension may be able to practice in another state.[4]

Caution:

Statutes forbidding a judge who has retired and is receiving retirement compensation from engaging in the practice of law may be held unconstitutional.[5]

Footnotes

1 State on Information of Dalton v. Russell, 365 Mo. 280, 281 S.W.2d 781 (1955).

2 State on Information of Dalton v. Russell, 365 Mo. 280, 281 S.W.2d 781 (1955).

3 Gay v. Whitehurst, 44 So. 2d 430 (Fla. 1950).

[4] Chairman of Bd. of Trustees of Emp. Retirement System v. Waldron, 285 Md. 175, 401 A.2d 172 (1979).

[5] State v. McMillan, 253 Ga. 154, 319 S.E.2d 1 (1984).

End of Document

46 Am. Jur. 2d Judges VII A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Judges

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VII. Compensation; Benefits; Allowances for Expenses

A. In General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 22(.5) to 22(6), 22(10), 22(11)

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 22(.5) to 22(6), 22(10), 22(11)

End of Document

46 Am. Jur. 2d Judges § 50

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VII. Compensation; Benefits; Allowances for Expenses

A. In General

§ 50. Basis of authority for compensation of judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 22(.5) to 22(4)

The Federal Constitution provides that Judges of the Supreme Court and inferior federal courts are to receive compensation for their services at stated times.[1] Similarly, state constitutions sometimes provide for the compensation of judicial officers as provided by law.[2] This type of provision both vests the power and authority to set the salary scale for the judiciary in the legislative branch of a state government and gives the judiciary the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities.[3] Such a provision has been interpreted as giving a nondelegable power to fix and ascertain the compensation of county judges to the legislature.[4] A state legislature's power to fix judicial compensation is immune from any interference or modification by county boards of supervisors or county officials who have no choice but to pay the compensation out of county funds as ordered by the legislature.[5]

Footnotes

1 U.S. Const. Art. III, § 1.

2 Goodheart v. Thornburgh, 118 Pa. Commw. 75, 545 A.2d 399 (1988), order aff'd, 521 Pa. 316, 555 A.2d 1210 (1989), on reconsideration, 523 Pa. 188, 565 A.2d 757 (1989); Franks v. State, 772 S.W.2d 428 (Tenn. 1989).

3 Goodheart v. Thornburgh, 118 Pa. Commw. 75, 545 A.2d 399 (1988), order aff'd, 521 Pa. 316, 555 A.2d 1210 (1989), on reconsideration, 523 Pa. 188, 565 A.2d 757 (1989).

4 Franks v. State, 772 S.W.2d 428 (Tenn. 1989).

5 Olson v. Cory, 35 Cal. 3d 390, 197 Cal. Rptr. 843, 673 P.2d 720 (1983).

End of Document

46 Am. Jur. 2d Judges § 51

American Jurisprudence, Second Edition | May 2021 Update

Judges

Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VII. Compensation; Benefits; Allowances for Expenses

A. In General

§ 51. Right to compensation and benefits of, or as between, particular types of judges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 22(.5) to 22(4)

There is a disagreement among the courts as to whether the payment of salary to a de facto officer is a valid defense to an action brought by a de jure officer when the de jure officer is not performing the duties of the position.[1] While some decisions support the view that a state or municipality which has paid to a de facto officer the salary of the office is not liable to the de jure officer for such salary,[2] other cases are to the effect that such payment in no way impairs the right of the officer de jure to recover the salary or compensation from the public body charged with the duty of paying it.[3] Under the latter view, a judge who establishes the entitlement to the office of county judge by disputing the election results is entitled to back pay, even though the judge who was initially declared the winner of the election has served and received pay during the period of the dispute.[4] A de jure judge is entitled to back pay without setting off earnings from other sources if the state constitution requires judicial officers to devote full time to their judicial duties[5] and if the de jure judge does not waive the right to compensation during the period in question, even though the party engages in the private practice of law.[6]

In some jurisdictions, statutes provide for the compensation of temporary judges.[7] The incumbent, under such a statute, would also be entitled to the incumbent's regular salary and benefits.[8] A state court judge appointed to fill the vacancy of an elected judge when such judge retired was not an "incumbent" judge appointed to serve the remainder of the elected judge's four-year term, and thus, was not entitled to the elected judge's salary for the term the appointee served, under a state constitutional provision that an "incumbent's salary, allowance, or supplement will not be decreased during the incumbent's term of office"; rather, the appointed judge had to run for election after serving at least six months, the appointee lost the election and therefore, the appointed judge's term ended on December 31 of that year, and the appointed judge was paid the same salary for the entire term of service.[9]

Footnotes

[1] Am. Jur. 2d, Public Officers and Employees §§ 294, 436.
As to de facto judges, generally, see §§ 226 to 231.

[2] Am. Jur. 2d, Public Officers and Employees §§ 294, 436.

[3] Am. Jur. 2d, Public Officers and Employees §§ 294, 436.

[4] Flack v. Graham, 453 So. 2d 819 (Fla. 1984).

[5] Flack v. Graham, 453 So. 2d 819 (Fla. 1984); Reed v. Sloan, 475 Pa. 570, 381 A.2d 421 (1977).

[6] Reed v. Sloan, 475 Pa. 570, 381 A.2d 421 (1977).

[7] State ex rel. Godfrey v. Gollmar, 76 Wis. 2d 417, 251 N.W.2d 438 (1977).
As to substitute judges, generally, see § 232.

[8] State ex rel. Godfrey v. Gollmar, 76 Wis. 2d 417, 251 N.W.2d 438 (1977).
As to disability benefits for judges, generally, see § 55.

[9] Heiskell v. Roberts, 295 Ga. 795, 764 S.E.2d 368 (2014).

End of Document

46 Am. Jur. 2d Judges § 52

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VII. Compensation; Benefits; Allowances for Expenses

A. In General

§ 52. Adequacy of judge's compensation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 22(.5), 22(5)

A legislature has a constitutional obligation to provide judges an adequate amount of compensation, commensurate with judicial responsibilities, in order to guarantee the independence of the judicial branch, despite a state constitution's failure to mention adequacy of compensation.[1] Retirement benefits have been considered in determining the adequacy of compensation; where a statute substantially reduces judges' retirement benefits, the reductions violate the constitutional requirement of adequate compensation of judges.[2]

Footnotes

[1] Goodheart v. Thornburgh, 118 Pa. Commw. 75, 545 A.2d 399 (1988), order aff'd, 521 Pa. 316, 555 A.2d 1210 (1989), on reconsideration, 523 Pa. 188, 565 A.2d 757 (1989).
As to changes in judges' compensation, generally, see §§ 57 to 60.
As to the validity of statutorily mandated differences in the compensation of judges or between judges and other public employees, see § 56.

[2] Goodheart v. Thornburgh, 118 Pa. Commw. 75, 545 A.2d 399 (1988), order aff'd, 521 Pa. 316, 555 A.2d 1210 (1989), on reconsideration, 523 Pa. 188, 565 A.2d 757 (1989).
As to retirement benefits, generally, see § 59.
As to changes in judges' compensation, generally, see §§ 57 to 60.

End of Document

46 Am. Jur. 2d Judges § 53

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VII. Compensation; Benefits; Allowances for Expenses

A. In General

§ 53. Additional compensation of judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 22(6)

State statutes sometimes permit judges to receive additional compensation over and above their salaries in special circumstances, such as where they are required to assume additional responsibilities.[1] However, a statutory provision permitting counties to provide additional compensation to general session judges who also exercise juvenile court jurisdiction violates a state constitutional provision which gives the nondelegable power to fix and ascertain the compensation of county judges to the legislature.[2] A state constitutional provision which guarantees every subject the right to free justice without being obliged to purchase it forbids the payment of a fee to judges for holding a special session and rendering a judicial decision for a party.[3] If a state statute prohibits judges from receiving fees in criminal matters, they are not entitled to retain the statutory fee collected by the court from persons convicted of traffic violations and the fee retained by the court to cover certain administrative costs as additional compensation for their services.[4]

A judicial parity statute prohibiting a judge from receiving any additional salary, compensation, emolument, or benefit for services as a judge, except payment of premiums for health, medical, dental, and hospitalization insurance programs, permitted the use of money from a criminal district court's judicial expense fund to purchase long-term care, critical illness, accidental death and dismemberment, and health insurance, but not payments relative to life insurance or an insurance reimbursement program for copayments or other out-of-pocket health expenses; the program to reimburse participants for out-of-pocket medical and dental expenses was not "insurance."[5]

Footnotes

1 State ex rel. Nagy v. City of Elyria, 54 Ohio App. 3d 101, 561 N.E.2d 551 (9th Dist. Lorain County 1988).

2 Franks v. State, 772 S.W.2d 428 (Tenn. 1989).

3 In re Estate of Dionne, 128 N.H. 682, 518 A.2d 178 (1986).

[4] Boagni v. DeJean, 342 So. 2d 270 (La. Ct. App. 3d Cir. 1977), writ denied, 344 So. 2d 671 (La. 1977).

[5] In re Derbigny, 2016-921 La. 1/20/17, 2017 WL 243467 (La. 2017).

End of Document

46 Am. Jur. 2d Judges § 54

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VII. Compensation; Benefits; Allowances for Expenses

A. In General

§ 54. Allowances for judge's expenses

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 22(10)

A.L.R. Library

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182

Federal court judges are allowed traveling and maintenance expenses.[1] State statutes sometimes provide for the reimbursement of actual and necessary expenses for the transportation of judges when performing judicial duties outside of the county where a judge is provided chambers.[2] The necessity of filing claims for expenses is dependent upon the particular statutory provisions.[3]

Statutes providing for the payment of expenses to judges do not violate constitutional guaranties of equal protection, constitutional provisions limiting judicial compensation to the salary provided by law, or constitutional prohibitions against changing the compensation of judges during their terms of office.[4]

However, a prescribed maximum for salary and expenses in some jurisdictions places an upper limit on expense allowances.[5] Applicable rules sometimes limit payment to those expenses necessarily incurred by reason of a justice's job-related assignments.[6]

Observation:

A governmental employer is not required to indemnify judges, acting in good faith, for legal expenses incurred in suits brought

against them for acts committed in the discharge of their duties.[7]

Footnotes

1 28 U.S.C.A. § 456.

2 Bergin v. Office of Court Admin., 190 A.D.2d 981, 594 N.Y.S.2d 85 (3d Dep't 1993).

3 Tierney v. Van Arsdale, 332 S.W.2d 546 (Ky. 1960).

4 Manning v. Sims, 308 Ky. 587, 213 S.W.2d 577, 5 A.L.R.2d 1154 (Ky. 1948).
As to constitutional provisions against changing judicial compensation during the term, generally, see § 57.
As to expense allowances affected by constitutional prohibitions against changing judicial compensation during the term, see § 58.
As to discriminatory salary schemes as possible equal protection violations, generally, see § 56.

5 Gipson v. Maner, 225 Ark. 976, 287 S.W.2d 467 (1956).

6 Bergin v. Office of Court Admin., 190 A.D.2d 981, 594 N.Y.S.2d 85 (3d Dep't 1993).

7 Hart v. County of Sagadahoc, 609 A.2d 282, 47 A.L.R.5th 943 (Me. 1992).
As to the liability of judges, generally, see §§ 61 to 79.

End of Document

46 Am. Jur. 2d Judges § 55

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VII. Compensation; Benefits; Allowances for Expenses

A. In General

§ 55. Retirement and disability benefits of judges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 22(.5), 22(4), 22(11)

State statutes generally entitle judges to a certain percentage of their "final salary"[1] or "final compensation"[2] upon retirement. A judge's "final salary," in this context, refers to the judge's last annual salary as an elected or appointed judge.[3] Under some statutes, a judge's "final compensation" is defined as the average monthly compensation for a certain number of months of service immediately preceding retirement.[4] Benefits are also provided by statute, in some jurisdictions, for judges who elect to retire prior to their normal retirement dates.[5]

Caution:

A judge's disability retirement pay under federal law is not excludable from gross income under the Internal Revenue Code since the former is a disability retirement provision, not a substitute for employer liability, hence not in the nature of workers' compensation.[6]

Judges may fall under the coverage of retirement systems for public employees[7] or under retirement plans specifically for judges.[8] Some pension plans applicable to judges are in the form of "contributory plans."[9] Prior retirement benefits statutes in effect at the time retired judges began employment created implied-in-fact contract rights which vested when the judges were appointed, subject to age and service requirements, for the purposes of determining whether subsequent amendments to the retirement statutes impaired the contractual relationships between the state and judges, within the meaning of the contracts clause of the state constitution.[10]

Per diem district court judges are not entitled to full-time membership credit in a state's retirement system for the entire

period of the per diem appointment, as their membership may comprise only those days for which those judges were actually compensated.[11]

Footnotes

1 Clarkson v. Judges' Retirement System, 173 Mich. App. 1, 433 N.W.2d 368 (1988).

2 Cornett v. Board of Trustees of Kentucky Judicial Form Retirement System, 764 S.W.2d 644 (Ky. Ct. App. 1989).
As to the validity of statutorily mandated differences in retirement benefits of judges or between judges and other public employees, see § 56.

3 Clarkson v. Judges' Retirement System, 173 Mich. App. 1, 433 N.W.2d 368 (1988).

4 Cornett v. Board of Trustees of Kentucky Judicial Form Retirement System, 764 S.W.2d 644 (Ky. Ct. App. 1989).

5 Cornett v. Board of Trustees of Kentucky Judicial Form Retirement System, 764 S.W.2d 644 (Ky. Ct. App. 1989).

6 Kane v. U.S., 43 F.3d 1446 (Fed. Cir. 1994).

7 Shiomos v. Com., State Employes' Retirement Bd., 128 Pa. Commw. 39, 562 A.2d 969 (1989), judgment rev'd on other grounds, 530 Pa. 481, 610 A.2d 15 (1992); Harshbarger v. Gainer, 184 W. Va. 656, 403 S.E.2d 399 (1991).
As to government retirement systems, generally, see Am. Jur. 2d, Pensions and Retirement Funds §§ 1074 to 1165.

8 Hargrove v. Board of Trustees of Maryland Retirement System, 310 Md. 406, 529 A.2d 1372 (1987); Harshbarger v. Gainer, 184 W. Va. 656, 403 S.E.2d 399 (1991).

9 Hargrove v. Board of Trustees of Maryland Retirement System, 310 Md. 406, 529 A.2d 1372 (1987).

10 Cloutier v. State, 163 N.H. 445, 42 A.3d 816 (2012).

11 Vail v. Employees' Retirement System of State, 75 Haw. 42, 856 P.2d 1227 (1993).

46 Am. Jur. 2d Judges § 56

American Jurisprudence, Second Edition | May 2021 Update

Judges
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VII. Compensation; Benefits; Allowances for Expenses

A. In General

§ 56. Validity of disparities in compensation or benefits for judges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 22(.5), 22(5)

Judicial salaries do not necessarily need to conform to territorial uniformity in order to survive an equal protection challenge.[1] Disparities between the salaries of judges on the same court level but in different locations have been challenged as violating judges' equal protections rights under both the applicable state and federal constitutional provisions, the success of such challenges sometimes based on the comparative similarity of the judges' duties and responsibilities, the size of case loads, population size, and the cost of living of the place in which the judges' offices are located.[2] For instance, probate judges were not similarly situated to magistrate judges for compensation purposes, and therefore the county's payment of longevity increases to magistrate judges and not probate judges was not a violation of a probate judge's equal protection rights; the state constitution created magistrate judges and probate judges as separate classes with separate jurisdictions, and statutes set forth separate jurisdiction, duties, and qualifications.[3] A salary disparity between judges on the same court level in two different counties does not violate equal protection absent a showing that costs of living in the counties is comparable.[4] Disparate judicial salary schedules do not involve suspect classes or fundamental rights and are therefore subject to rational basis review when challenged on equal protection grounds.[5]

Under an equal protection challenge, a discriminatory regulation within a judicial retirement scheme which merely regulates the amount of pension benefits available based on certain contingencies, without infringing on a judge's right to pursue an occupation,[6] is subjected to the rational basis test.[7] Under this type of analysis, a retirement scheme is not invalidated merely because its judicial plan differs in some aspects from that offered to other state employees.[8]

Observation:

A state scheme which offsets a judicial pension by the amount of federal salary received and totally denies a judicial pension when the total income from both federal salary and pension benefits exceeds the amount the judge would have received if the party had stayed on the state bench has a reasonable purpose of preventing judges from being wooed off the state bench.[9]

Footnotes

1 Davis v. Rosenblatt, 159 A.D.2d 163, 559 N.Y.S.2d 401 (3d Dep't 1990).
As to equal protection of the laws, generally, see Am. Jur. 2d, Constitutional Law §§ 823 to 941.

2 Davis v. Rosenblatt, 159 A.D.2d 163, 559 N.Y.S.2d 401 (3d Dep't 1990).

3 Lewis v. Chatham County Bd. of Com'rs, 298 Ga. 73, 779 S.E.2d 371 (2015).

4 Affronti v. Crosson, 95 N.Y.2d 713, 723 N.Y.S.2d 757, 746 N.E.2d 1049 (2001).

5 Affronti v. Crosson, 95 N.Y.2d 713, 723 N.Y.S.2d 757, 746 N.E.2d 1049 (2001).

6 Hargrove v. Board of Trustees of Maryland Retirement System, 310 Md. 406, 529 A.2d 1372 (1987).

7 Walker v. Employees Retirement System of Texas, 753 S.W.2d 796 (Tex. App. Austin 1988), writ denied, (Nov. 30, 1988).
As to equal protection of the laws, generally, see Am. Jur. 2d, Constitutional Law §§ 823 to 941.

8 Hargrove v. Board of Trustees of Maryland Retirement System, 310 Md. 406, 529 A.2d 1372 (1987).

9 Hargrove v. Board of Trustees of Maryland Retirement System, 310 Md. 406, 529 A.2d 1372 (1987).

End of Document

46 Am. Jur. 2d Judges VII B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VII. Compensation; Benefits; Allowances for Expenses

B. Changes in Compensation

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 22(7), 22(9), 22(11)

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 22(7), 22(9), 22(11)

End of Document

46 Am. Jur. 2d Judges § 57

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VII. Compensation; Benefits; Allowances for Expenses

B. Changes in Compensation

§ 57. Reduction or increase of judge's compensation during term of office

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 22(7)

The Compensation Clause of the United States Constitution prohibits the diminution of federal judges' compensation during their continuance in office.[1] The Compensation Clause does not forbid Congress from applying a generally applicable, nondiscriminatory tax (including an increase in rates or a change in conditions) to the salaries of federal judges, whether or not they were appointed before enactment of the tax.[2]

Observation:

Under the Compensation Clause, the legislature cannot directly reduce judicial salaries even as part of an equitable effort to reduce all government salaries.[3]

In the absence of a constitutional prohibition, a state legislature generally may increase or diminish judicial salaries during a term of office.[4] Many state constitutions either contain similar provisions with reference to the compensation of judges of state courts,[5] or prohibit an increase or diminution during the elected term.[6] In such situations, it is said that the contractual obligation to pay judicial salaries assumed by the state may not constitutionally be impaired by changes in the terms of the offer that are less beneficial than those at the beginning of a judge's service during the term's performance.[7]

Some constitutional provisions, however, qualify the rule somewhat, providing that compensation of justices, judges, and justices of the peace may not be diminished during their terms of office, unless by law applying generally to all salaried officers of the state,[8] and similar rules have been statutorily enacted in some jurisdictions.[9] A state constitutional provision that chancellors are entitled to receive for their services compensation that will not be diminished during their time in office

does not prevent the supreme court from suspending judges without pay during the period in which they will perform no services, so long as the suspension is part of a final order of discipline for judicial misconduct.[10] Thus, a constitutional provision that the compensation of a judge may not be diminished during the judge's term of office does not preclude a state supreme court from imposing a suspension without compensation as a sanction in a judicial discipline proceeding.[11]

A decision which ruled that the governor and the legislature, by directly and explicitly tying consideration of judicial compensation to unrelated policy initiatives, violated the separation of powers doctrine, did not establish that current and retired judges and justices were constitutionally entitled to raises, and thus an award of retroactive monetary damages, as compensation for the state's failure to grant raises to judges and justices, was not warranted.[12]

Observation:

The purposes of prohibitions against diminishing judicial compensation are to promote the independence of the judiciary[13] and enhance the quality of justice by attracting able lawyers whose private practice salaries may be more lucrative than those of the bench.[14]

Caution:

A state statute which purported to reduce salaries of reserve judges by an amount equal to any Federal Social Security benefits received by such judges was invalid under the Supremacy Clause of the United States Constitution,[15] since it effectively deprived social security recipients of benefits provided under federal law.[16]

CUMULATIVE SUPPLEMENT

Cases:

State's contribution to cost of state judges' health care insurance premiums is not judicial "compensation" protected from direct diminution by state Constitution's Judicial Compensation Clause; such contribution is not part of a judicial salary, nor a permanent remuneration for expenses necessarily incurred in fulfillment of judicial obligations. McKinney's Const. Art. 6, § 25(a); McKinney's Civil Service Law § 167(8). Bransten v. State, 30 N.Y.3d 434, 68 N.Y.S.3d 19, 90 N.E.3d 818 (2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S. Const. Art. III, § 1.

District court judges enjoy the protections of Article III, namely, life tenure and pay that cannot be diminished. Wellness Intern. Network, Ltd. v. Sharif, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015).

2 U.S. v. Hatter, 532 U.S. 557, 121 S. Ct. 1782, 149 L. Ed. 2d 820 (2001).

3 U.S. v. Hatter, 532 U.S. 557, 121 S. Ct. 1782, 149 L. Ed. 2d 820 (2001).

4 Higer v. Hansen, 67 Idaho 45, 170 P.2d 411 (1946).

5 Garian v. City of Highland Park, 176 Mich. App. 379, 439 N.W.2d 368 (1989); Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991).

6 Franks v. State, 772 S.W.2d 428 (Tenn. 1989); County Court Judges Ass'n v. Sidi, 752 P.2d 960 (Wyo. 1988).
A county cannot reduce a judge's correctly calculated salary or supplement, but an incorrectly calculated salary is not the amount due the recipient, and the county can, and should, reduce it. Maddox v. Hayes, 278 Ga. 141, 598 S.E.2d 505 (2004).

7 Sylvestre v. State, 298 Minn. 142, 214 N.W.2d 658 (1973).

8 Goodheart v. Thornburgh, 118 Pa. Commw. 75, 545 A.2d 399 (1988), order aff'd, 521 Pa. 316, 555 A.2d 1210 (1989), on reconsideration, 523 Pa. 188, 565 A.2d 757 (1989).
As to compensation of justices of the peace, generally, see Am. Jur. 2d, Justices of the Peace § 2.

9 Garian v. City of Highland Park, 176 Mich. App. 379, 439 N.W.2d 368 (1989).

10 Mississippi Com'n on Judicial Performance v. Littlejohn, 172 So. 3d 1157 (Miss. 2015).

11 In re Disciplinary Action Against McGuire, 2004 ND 171, 685 N.W.2d 748 (N.D. 2004).

12 Larabee v. Governor of State, 27 N.Y.3d 469, 34 N.Y.S.3d 389, 54 N.E.3d 61 (2016).

13 U. S. v. Will, 449 U.S. 200, 101 S. Ct. 471, 66 L. Ed. 2d 392 (1980); Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991).

14 U. S. v. Will, 449 U.S. 200, 101 S. Ct. 471, 66 L. Ed. 2d 392 (1980).

15 U.S. Const. Art. VI, § 2.

16 Raskin v. Moran, 684 F.2d 472 (7th Cir. 1982).

End of Document

46 Am. Jur. 2d Judges § 58

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VII. Compensation; Benefits; Allowances for Expenses

B. Changes in Compensation

§ 58. Effect of allowances for judge's expenses on prohibition against change of salary during term

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 22(7)

A.L.R. Library

Constitutional provision fixing or limiting salary of public officer as precluding allowance for expenses or disbursements, 5 A.L.R.2d 1182

A constitutional prohibition against the change of judicial salaries during a judge's term of office is not violated by the allowance of reasonable general, travel, or clerical expenses, since, unless the contrary is clearly expressed, the allowance of reasonable expenses incurred in the discharge of judicial duties is neither salary, compensation, nor an emolument within a constitutional provision limiting official salaries during the term.[1] However, an allowance of additional expenses to a judge is invalid and unconstitutional where the officer already receives the maximum provided by the constitution for salary and expenses.[2]

Footnotes

1 Manning v. Sims, 308 Ky. 587, 213 S.W.2d 577, 5 A.L.R.2d 1154 (Ky. 1948).
As to the constitutional prohibition against changing judicial salaries, generally, see § 57.
As to expense allowances, generally, see § 54.

2 Gipson v. Maner, 225 Ark. 976, 287 S.W.2d 467 (1956).

End of Document

46 Am. Jur. 2d Judges § 59

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VII. Compensation; Benefits; Allowances for Expenses

B. Changes in Compensation

§ 59. Retirement benefits of judges

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 22(11)

In some jurisdictions, a reduction in retirement benefits for judges violates a legislature's constitutional obligation to provide judges an adequate amount of compensation.[1] In other jurisdictions, changes in judges' retirement benefits have been held violative of state constitutional provisions prohibiting changes of compensation during a judge's term of office.[2] Since public employees generally have contractual or vested rights in a public pension, where such pension is part of the terms of employment,[3] an enforceable contract arises upon completion of service by a judge, in accordance with the terms of an offer, established by law, to pay a portion of the judge's salary, for the balance of the judge's life upon voluntary retirement, after reaching a specified age.[4] In some jurisdictions, if they assume no additional duties after retirement,[5] retired members of the judiciary do not subject their pension contracts to subsequent legislation,[6] or amendments or modifications which impair contractual obligations due them or impact detrimentally upon their retirement benefits,[7] whether or not their pensions have vested.[8] A judge who assumes another term of office, after retirement, fully aware of new legislation passed in the interim and its applicability to public employees in the party's position, becomes subject to its terms and conditions and those terms and conditions are incorporated into the renewed pension contract.[9] Judicial retirement statutes which provided for the forfeiture of vested retirement benefits if a judge ran for, was elected to, and served in a new term of office after reaching the age of 70 did not violate equal protection, based on the judges' assertion that judges who served longer terms received greater benefits than those who served less time on the bench; it was not irrational for the State to base retirement benefits on length of judicial service.[10]

Judges who retire prior to changes in a state's judicial pension plan are not entitled to the benefits that the changes in the law make.[11]

Footnotes

1 § 52.

[2] Goodheart v. Thornburgh, 118 Pa. Commw. 75, 545 A.2d 399 (1988), order aff'd, 521 Pa. 316, 555 A.2d 1210 (1989), on reconsideration, 523 Pa. 188, 565 A.2d 757 (1989).
As to entitlement to retirement benefits, generally, see § 55.

[3] Am. Jur. 2d, Pensions and Retirement Funds § 1081.

[4] Sylvestre v. State, 298 Minn. 142, 214 N.W.2d 658 (1973).

[5] Shiomos v. Com., State Employes' Retirement Bd., 533 Pa. 588, 626 A.2d 158 (1993).

[6] Shiomos v. Com., State Employes' Retirement Bd., 533 Pa. 588, 626 A.2d 158 (1993).

[7] White v. Com., State Employes' Retirement System, 129 Pa. Commw. 335, 565 A.2d 839 (1989).

[8] Shiomos v. Com., State Employes' Retirement Bd., 533 Pa. 588, 626 A.2d 158 (1993).

[9] Shiomos v. Com., State Employes' Retirement Bd., 533 Pa. 588, 626 A.2d 158 (1993).

[10] Landers v. Stone, 2016 Ark. 272, 496 S.W.3d 370 (2016).

[11] Connolly v. Division of Public Employee Retirement Admin., 415 Mass. 800, 616 N.E.2d 59 (1993).

End of Document

46 Am. Jur. 2d Judges § 60

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VII. Compensation; Benefits; Allowances for Expenses

B. Changes in Compensation

§ 60. Suspension of judges' pay pending disciplinary or criminal proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 22(7), 22(9)

In lieu of removal, a state supreme court may, upon a proper showing of abuse or misconduct, order that a judge be suspended.[1] However, the practice of suspending judges without pay, pending the disposition of criminal charges or the completion of underlying judicial disciplinary hearings, has been challenged as a deprivation of property without due process of law, an impairment of an obligation of contract, and an unconstitutional diminution of judicial salary.[2] Although some courts have held that the public confidence and the integrity of the judiciary will best be served by suspending the judge with pay pending the outcome of judicial disciplinary proceedings,[3] there is also authority that supports suspending a judge who has been indicted or charged with a criminal offense, without pay pending final disposition of those charges,[4] and that such action is constitutionally valid under the applicable state constitutional provisions.[5] Courts which have supported the suspension of judicial officers without compensation have reasoned that such public officers are not entitled to compensation since, at common law, their right to compensation arose out of the performance of their duties and was incident to the office itself, rather than to the person discharging the duties,[6] and that the overriding public interest in preserving the integrity of the judiciary demands that the personal interests of the judge be subordinated and the judge suspended without pay pending the outcome of an appeal of a judge's conviction and a judicial proceeding initiated against the judge.[7]

Footnotes

1 § 20.

2 Matter of Grubb, 187 W. Va. 228, 417 S.E.2d 919 (1992).

3 In re Complaint Concerning Kirby, 350 N.W.2d 344 (Minn. 1984); State ex rel. Green v. Tilton, 1 Ohio St. 3d 54, 437 N.E.2d 1174 (1982).

4 Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991); Matter of Grubb, 187 W. Va. 228, 417 S.E.2d 919 (1992).

[5] Matter of Grubb, 187 W. Va. 228, 417 S.E.2d 919 (1992).

[6] Matter of Ferguson, 304 S.C. 216, 403 S.E.2d 628 (1991).

[7] Matter of Grubb, 187 W. Va. 228, 417 S.E.2d 919 (1992).
It would invite scorn and disrespect for our rule of law were we to adopt an interpretation of the constitution that would require the state or a municipality to pay salary to a convicted judge while the convicted judge is in jail paying a debt to society for a felonious transgression against its laws. Ginsberg v. Purcell, 51 N.Y.2d 272, 434 N.Y.S.2d 147, 414 N.E.2d 648 (1980).

End of Document

46 Am. Jur. 2d Judges VIII A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 35 to 37

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 35 to 37

End of Document

46 Am. Jur. 2d Judges § 61

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

1. In General

§ 61. Rule of absolute judicial immunity, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 35, 36

A.L.R. Library

Civil liability of judicial officer for malicious prosecution or abuse of process, 64 A.L.R.3d 1251

Immunity of public officials from personal liability in civil rights actions brought by public employees under 42 U.S.C.A. sec. 1983, 63 A.L.R. Fed. 744

It is generally recognized that public officers and employees would be unduly hampered, deterred, and intimidated in the discharge of their duties if those who act improperly, or even exceed the authority given them, were not protected to some reasonable degree by being relieved from private liability.[1]

Judicial immunity is absolute immunity from suit.[2] Absolute immunity is generally reserved for judges performing judicial acts within their jurisdiction, prosecutors performing acts intimately associated with the judicial phase of the criminal process, and quasi-judicial agency officials whose duties are comparable to those of judges or prosecutors when adequate procedural safeguards exist.[3]

Judges enjoy a comparatively sweeping form of absolute immunity,[4] which is not abrogated by a state's government tort claims law.[5] For instance, judges have absolute immunity from civil liability for their decisions, a principle fully applicable to misconduct proceedings.[6] Absolute judicial immunity bars any suit for money damages against individual judicial defendants when the judge has jurisdiction over the subject matter and is performing a judicial act.[7] The doctrine has been adopted by federal courts in the civil rights context to bar civil suits for money damages under the civil rights statute[8] against judicial officers for alleged constitutional violations[9] and is appropriately applied to suits under the Indian Civil Rights Act.[10]

Whether absolute judicial immunity exists in a particular case is a question of law for the courts.[11] Absolute immunity is a powerful shield attaching primarily to judicial functions, not to the person or position.[12] Even where the rule of absolute judicial immunity does not apply, other forms of immunity may apply to judges, depending on the types of acts involved. For example, acts involving nonjudicial functions may nonetheless be protected by legislative and prosecutorial immunity,[13] or "qualified" immunity,[14] and, if the acts of judges involve both judicial and nonjudicial conduct, the unprotected behavior must be separated from the shielded behavior such that judges may be held liable for their nonjudicial acts.[15] The sphere of protected action must be related closely to the immunity's justifying purposes, as immunities are grounded in the nature of the function performed, not the identity of the actor who performed it; hence, for example, a judge's absolute immunity does not extend to actions performed in a purely administrative capacity.[16]

Footnotes

1 Am. Jur. 2d, Public Officers and Employees § 298.

2 Blevins v. Hudson, 2016 Ark. 150, 489 S.W.3d 165 (2016), cert. denied, 137 S. Ct. 239, 196 L. Ed. 2d 134 (2016).

3 Braswell v. Haywood Regional Medical Center, 352 F. Supp. 2d 639 (W.D. N.C. 2005).

4 Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988); Maunsell v. Johnson, 100 Fed. Appx. 47 (2d Cir. 2004).

5 Fisher v. Pickens, 225 Cal. App. 3d 708, 275 Cal. Rptr. 487 (4th Dist. 1990).

6 In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 558 (U.S. Jud. Conf. 2008).

7 Smith v. City of Hammond, Indiana, 388 F.3d 304 (7th Cir. 2004); Regan v. Price, 131 Cal. App. 4th 1491, 33 Cal. Rptr. 3d 130 (3d Dist. 2005).
Doctrine of absolute judicial immunity bars civil suits against judges for acts done by them in exercise of their judicial functions. Keller-Bee v. State, 448 Md. 300, 138 A.3d 1253 (2016).
If a judicial officer has jurisdiction of the person and of the subject matter, the officer is exempt from civil liability for actions arising out of the litigation so long as the actions are within the judicial officer's judicial capacity. Hall v. Jones, 2015 Ark. 2, 453 S.W.3d 674 (2015).
An act is done in the "clear absence of all jurisdiction," for judicial immunity purposes, if the matter upon which the judge acts is clearly outside the subject-matter jurisdiction of the court over which the judge presides. Ireland v. Tunis, 113 F.3d 1435, 1997 FED App. 0156P (6th Cir. 1997).

8 42 U.S.C.A. § 1983.

9 Pierson v. Ray, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967); Ledbetter v. City of Topeka, Kan., 318 F.3d 1183 (10th Cir. 2003); Horton v. Marovich, 925 F. Supp. 532 (N.D. Ill. 1996).

10 Sandman v. Dakota, 816 F. Supp. 448 (W.D. Mich. 1992), order aff'd, 7 F.3d 234 (6th Cir. 1993) (referring to 25 U.S.C.A. §§ 1302 et seq.).

11 Lavit v. Superior Court In and For County of Maricopa, 173 Ariz. 96, 839 P.2d 1141 (Ct. App. Div. 1 1992).

12 Brunson v. Murray, 843 F.3d 698 (7th Cir. 2016).

13 § 72.

14 § 73.

15 Moore v. Taylor, 541 So. 2d 378, 53 Ed. Law Rep. 348 (La. Ct. App. 2d Cir. 1989).
As to actions protected, generally, see § 67.

As to liability for nonjudicial acts, generally, see § 70.

16 Clinton v. Jones, 520 U.S. 681, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997).

End of Document

46 Am. Jur. 2d Judges § 62

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

1. In General

§ 62. Basis and rationale for rule of absolute judicial immunity

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Judges 35

Judicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent and impartial judgment about the merits of a case[1] without apprehension of the personal consequences of exposure to potential damages liability,[2] and to be free from vexatious and frivolous actions prosecuted by disgruntled litigants.[3] Moreover, it is generally held that application of the doctrine is necessary to protect the finality of judgments,[4] discourage inappropriate collateral attacks,[5] ensure that most judicial mistakes or wrongs are open to correction through ordinary mechanisms of review,[6] and prevent an avalanche of suits which would provide powerful incentives for judges to avoid rendering decisions likely to provoke them,[7] waste judicial time, and deter competent persons from taking office.[8]

Footnotes

1 Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 113 S. Ct. 2167, 124 L. Ed. 2d 391 (1993); Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988); Dennis v. Sparks, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980).
Judicial immunity furthers the public interest in the administration of justice by allowing judicial officers to be free to act on their own convictions, without fear of personal liability. Sledd v. Garrett, 123 S.W.3d 592 (Tex. App. Houston 14th Dist. 2003).

2 Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 113 S. Ct. 2167, 124 L. Ed. 2d 391 (1993).

3 Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

4 Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988); Carey v. Dostert, 185 W. Va. 247, 406 S.E.2d 678 (1991).

[5] Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988); Meyer v. Foti, 720 F. Supp. 1234 (E.D. La. 1989).

[6] Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988); Lavit v. Superior Court In and For County of Maricopa, 173 Ariz. 96, 839 P.2d 1141 (Ct. App. Div. 1 1992).

[7] Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

[8] Lavit v. Superior Court In and For County of Maricopa, 173 Ariz. 96, 839 P.2d 1141 (Ct. App. Div. 1 1992).

End of Document

46 Am. Jur. 2d Judges § 63

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

1. In General

§ 63. Persons protected by rule of absolute judicial immunity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 35, 36

Judicial immunity from civil liability extends to all classes of courts,[1] from the highest judge of the nation to the lowest officer who sits as a court and tries petty cases.[2] Judges of courts of limited jurisdiction are exempt from liability to the same extent as judges of courts of general jurisdiction,[3] and immunity extends both to judges pro tempore who exercise all the authority and jurisdiction of the regular judges they replace[4] and to Indian tribal judges.[5] The general rule protecting judges from civil liability for judicial acts performed with full jurisdiction over the subject matter and the person also extends to justices of the peace.[6]

The privilege of judicial immunity applies not only to judges but also to court-appointed referees performing subordinate judicial duties.[7] The doctrine of judicial immunity extends to other officials who are delegated judicial or quasi-judicial functions, including court-appointed receivers, who act as an arm of the court.[8] Certain judicial actors, such as judges and receivers, are entitled to absolute immunity from civil liability for acts committed within their judicial capacity if the particular act at issue is a judicial act.[9] When public officers are invested with discretion and are empowered to exercise their judgment in matters brought before them, they are sometimes called quasi-judicial officers, and enjoy immunity similar to that enjoyed by judges when exercising a judicial function within the scope of their general authority.[11] Quasi-judicial officers enjoying absolute judicial immunity include members of a state civil rights commission[12] and court clerks.[13] Judges, prosecutors, and officials who fill quasi-judicial and quasi-prosecutorial roles are entitled to absolute immunity from damages stemming from many of their official acts, no matter how erroneous or harmful.[14]

Observation:

The judicial function test is used to determine quasi-judicial immunity from liability.[15] Judicial officers are entitled to quasi-judicial immunity in one of two ways: first, immunity might apply when they are sued for engaging in quasi-judicial functions, that is, functions that are similar to those a judge performs, and the touchstone of this analysis is whether the officer is

engaged in discretionary functions, such as resolving disputes between parties, or authoritatively adjudicating private rights, and the second way of obtaining quasi-judicial immunity is engaging in a nondiscretionary or administrative function, but at the explicit direction of a judicial officer.[16] When the judicial function test is utilized to determine whether an administrative proceeding is quasi-judicial, the due process protections afforded during a proceeding do not, alone, determine whether it is quasi-judicial; instead, whether procedural protections are afforded during the proceeding goes to the ability of the hearing entity to hear witnesses and make a decision affecting property rights and is but one consideration in determining whether the hearing entity is performing a judicial function.[17]

Footnotes

1 Myers Through Myers v. Price, 463 N.W.2d 773 (Minn. Ct. App. 1990).
As to absolute judicial immunity, generally, see § 61.

2 Bunn v. Orem, 878 F. Supp. 59 (N.D. W. Va. 1995).

3 Rumfola v. Murovich, 812 F. Supp. 569 (W.D. Pa. 1992).

4 Hupp v. Hill, 576 N.E.2d 1320 (Ind. Ct. App. 1991).
As to pro tem judges, generally, see §§ 232 to 252.

5 Sandman v. Dakota, 816 F. Supp. 448 (W.D. Mich. 1992), order aff'd, 7 F.3d 234 (6th Cir. 1993).

6 Am. Jur. 2d, Justices of the Peace §§ 66 to 72.

7 Regan v. Price, 131 Cal. App. 4th 1491, 33 Cal. Rptr. 3d 130 (3d Dist. 2005).

8 Ram v. Lal, 906 F. Supp. 2d 59, 84 Fed. R. Serv. 3d 187 (E.D. N.Y. 2012).

9 District of Columbia v. Pizzulli, 917 A.2d 620 (D.C. 2007).

11 Am. Jur. 2d, Public Officers and Employees § 318.

12 Crenshaw v. Baynerd, 180 F.3d 866 (7th Cir. 1999).

13 Harris v. Suter, 3 Fed. Appx. 365 (6th Cir. 2001).

14 Doermer v. Callen, 847 F.3d 522 (7th Cir. 2017).

15 State, ex rel. Bd. of Parole Com'rs v. Morrow, 127 Nev. 265, 255 P.3d 224, 127 Nev. Adv. Op. No. 21 (2011).

16 Zoretic v. Darge, 832 F.3d 639 (7th Cir. 2016).

17 State, ex rel. Bd. of Parole Com'rs v. Morrow, 127 Nev. 265, 255 P.3d 224, 127 Nev. Adv. Op. No. 21 (2011).

End of Document

46 Am. Jur. 2d Judges § 64

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

1. In General

§ 64. Effect of bad faith or wrongful conduct on application of rule of absolute judicial immunity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 35 to 37

Absolute immunity generally applies to all acts committed within the scope of a public office.[1] Even grave procedural errors or acts taken when no statute purports to confer on the court the authority purportedly exercised will not deprive a judge of absolute judicial immunity.[2] Judges are not deprived of immunity from a suit for money damages merely because of allegations that they committed grave procedural errors[3] or acted maliciously,[4] corruptly,[5] or with evil motive, intent,[6] personal interest,[7] bad faith,[8] or outright malevolence.[9] Since absolute immunity is justified and defined by the governmental functions it protects and serves, not by the motives with which a particular officer performs those functions,[10] it is a judge's actions alone, not intent that must be considered;[11] state of mind is not a necessary element[12] and judicial immunity applies, however injurious the consequences to the plaintiff.[13]

Footnotes

1 Am. Jur. 2d, Public Officers and Employees § 307.

2 Bright v. Gallia County, Ohio, 753 F.3d 639 (6th Cir. 2014), cert. denied, 135 S. Ct. 1561, 191 L. Ed. 2d 663 (2015).

3 Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991); Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993); In re Luna, 152 B.R. 11 (Bankr. D. Mass. 1993).

4 Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991); Beepot v. J.P. Morgan Chase Nat. Corporate Services, Inc., 57 F. Supp. 3d 1358 (M.D. Fla. 2014), aff'd, 626 Fed. Appx. 935 (11th Cir. 2015); B.J.S. v. State Educ. Department/University of New York, 699 F. Supp. 2d 586, 258 Ed. Law Rep. 140 (W.D. N.Y. 2010).

[5] B.J.S. v. State Educ. Department/University of New York, 699 F. Supp. 2d 586, 258 Ed. Law Rep. 140 (W.D. N.Y. 2010); Stephens v. Herring, 827 F. Supp. 359 (E.D. Va. 1993).

[6] JNC Companies v. Ollason, 137 B.R. 46 (D. Ariz. 1991), aff'd, 996 F.2d 1225 (9th Cir. 1993); Meyer v. Foti, 720 F. Supp. 1234 (E.D. La. 1989).

[7] Brummett v. Camble, 946 F.2d 1178 (5th Cir. 1991).

[8] Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991); Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991); Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993).

[9] Brummett v. Camble, 946 F.2d 1178 (5th Cir. 1991).

[10] Brummett v. Camble, 946 F.2d 1178 (5th Cir. 1991).

[11] Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993).

[12] JNC Companies v. Ollason, 137 B.R. 46 (D. Ariz. 1991), aff'd, 996 F.2d 1225 (9th Cir. 1993).

[13] JNC Companies v. Ollason, 137 B.R. 46 (D. Ariz. 1991), aff'd, 996 F.2d 1225 (9th Cir. 1993).

End of Document

46 Am. Jur. 2d Judges § 65

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

1. In General

§ 65. Actions against judge for injunctive or declaratory relief

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Judges 35, 36

Since English law developed limited exceptions to the common-law doctrine of absolute judicial immunity, most of which involved prerogative writs, such as mandamus and prohibition, to allow superior courts to oversee inferior courts to control the proper exercise of jurisdiction,[1] it is generally held that neither absolute nor qualified judicial immunity insulates a judge from the reach of a court's equity power[2] and legislative immunity, which protects judges when they enact rules[3] or applies to suits for declaratory or injunctive relief.[4] A court is not precluded from granting either prospective injunctive relief[5] or declaratory relief[6] against judicial officers acting in their judicial capacities[7] or from adjudicating the merits of a claim attacking the prospective application and constitutionality of a statute or rule, where a judge is a nominal defendant and no other relief is being requested.[8] Neither judicial immunity nor Eleventh Amendment immunity, both of which shielded judges from being sued for damages, applied to bar an action against two state court judges in which former state court litigants requested only declaratory relief.[9]

Footnotes

1 Page v. Grady, 788 F. Supp. 1207 (N.D. Ga. 1992).
As to general rule of nonliability for damages in civil rights cases, see § 61.

2 Society of Separationists, Inc. v. Herman, 939 F.2d 1207 (5th Cir. 1991), on reh'g, 959 F.2d 1283 (5th Cir. 1992).

3 § 70.

4 Giannini v. Real, 711 F. Supp. 992, 15 Fed. R. Serv. 3d 559 (C.D. Cal. 1989), judgment aff'd, 911 F.2d 354 (9th Cir. 1990).
As to legislative immunity from damages, see § 72.

[5] Pulliam v. Allen, 466 U.S. 522, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984); Berger v. Cuyahoga County Bar Ass'n, 983 F.2d 718 (6th Cir. 1993).

[6] Society of Separationists, Inc. v. Herman, 939 F.2d 1207 (5th Cir. 1991), on reh'g, 959 F.2d 1283 (5th Cir. 1992).

[7] Pulliam v. Allen, 466 U.S. 522, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984); Berger v. Cuyahoga County Bar Ass'n, 983 F.2d 718 (6th Cir. 1993).

[8] Rivera Puig v. Garcia Rosario, 785 F. Supp. 278 (D.P.R. 1992), judgment aff'd and remanded, 983 F.2d 311 (1st Cir. 1992).

[9] Cichowski v. Hollenbeck, 397 F. Supp. 2d 1082 (W.D. Wis. 2005).

End of Document

46 Am. Jur. 2d Judges § 66

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

1. In General

§ 66. Actions against judge for injunctive or declaratory relief—Civil rights and *Bivens* actions

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Judges 35, 36

Judicial immunity does not extend to civil rights actions under federal law,[1] seeking prospective injunctive relief against the judicial acts of state court judges.[2]

On the other hand, the abrogation of judicial immunity for suits seeking injunctive relief is inapplicable to *Bivens* actions,[3] where federal judges enjoy the same immunity from equitable remedies as they do from damages for alleged constitutional torts committed during the exercise of their judicial functions.[4] This distinction from the civil rights cases has been justified because:

(1) while common-law concepts of judicial immunity permitted injunctive-type writs against inferior or rival courts and state judges are, as a matter of federal law, subject to the authority of federal courts on issues governed by federal constitutional or statutory law, a federal court judge may not enjoin the conduct of a member of a coequal or superior federal tribunal for reasons of policy and jurisdictional power;[5]

(2) *Bivens* itself was concerned with money damages, not injunctive relief;[6] and

(3) while it is generally held that the common-law doctrine of judicial immunity cannot be extended in a manner which would thwart discernible congressional intent,[7] a *Bivens* action is a judicially created remedy which lacks explicit congressional statutory permission for suits against federal officials.[8]

CUMULATIVE SUPPLEMENT

Cases:

Military judge presiding over, and prosecutors participating in, military commission prosecution of alien enemy combatant, in issuing subpoena and warrant of attachment to compel former active-duty officer's testimony before the commission,

resulting in officer being forcefully taken from his home in Massachusetts to testify in Virginia by video, did not violate officer's clearly established rights, and thus, they were entitled to qualified immunity from liability on officer's *Bivens* claims against them; no court had accepted argument that Rules for Military Commissions authorizing military prosecutors to issue subpoenas and military judges to issue warrants of attachment for third-party witnesses were illegal, and defendants followed applicable regulations. Gill v. United States, 415 F. Supp. 3d 127 (D.D.C. 2019).

[END OF SUPPLEMENT]

Footnotes

1 42 U.S.C.A. § 1983.

2 Pulliam v. Allen, 466 U.S. 522, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984).

3 Page v. Grady, 788 F. Supp. 1207 (N.D. Ga. 1992).
The Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the state in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen, and citizen who sustains damages as result of federal agents' violation of Fourth Amendment is not limited to action in tort, under state law, in state courts, to obtain money damages to redress the invasion of Fourth Amendment rights. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

4 Wightman v. Jones, 809 F. Supp. 474 (N.D. Tex. 1992); Stephens v. Herring, 827 F. Supp. 359 (E.D. Va. 1993).
As to federal judges, generally, see Am. Jur. 2d, Federal Courts §§ 18 to 148.

5 Page v. Grady, 788 F. Supp. 1207 (N.D. Ga. 1992); Stephens v. Herring, 827 F. Supp. 359 (E.D. Va. 1993).

6 Stephens v. Herring, 827 F. Supp. 359 (E.D. Va. 1993).

7 Pulliam v. Allen, 466 U.S. 522, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984); In re Perry, 882 F.2d 534 (1st Cir. 1989).

8 Page v. Grady, 788 F. Supp. 1207 (N.D. Ga. 1992); Wightman v. Jones, 809 F. Supp. 474 (N.D. Tex. 1992); Stephens v. Herring, 827 F. Supp. 359 (E.D. Va. 1993).

End of Document

46 Am. Jur. 2d Judges § 67

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

2. Liability for Particular Types of Conduct

a. In General; Conduct Within Scope of Rule of Absolute Judicial Immunity

§ 67. Conduct covered by rule of absolute judicial immunity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 35, 36

The courts generally have distinguished between judicial acts and administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform.[1] Judges have absolute immunity for judicial acts,[2] even where the judge's acts are alleged to have been done maliciously or corruptly[3] or where the act is unfair, injurious, or inappropriate.[4] In other words, a judge does not lose judicial immunity because an action is erroneous, malicious, in excess of authority, or disregardful of elementary principles of procedural due process, as long as the judge had jurisdiction over the subject matter before the judge; a judge will lose the cloak of immunity only when the judge conducts proceedings over which the judge lacks any semblance of subject-matter jurisdiction.[5] The doctrine of judicial immunity is so expansive that it is overcome only when (1) the action is nonjudicial, that is, not taken in the judge's judicial capacity; or (2) the action, although judicial in nature, is performed in the complete absence of any jurisdiction.[6] However, judicial immunity is not designed to insulate the judiciary from all aspects of accountability,[7] and the mere fact that a defendant in a civil action is a judge does not mean that the defendant is entitled to absolute judicial immunity.[8] Judges are not absolutely immune from liability and damages for administrative, legislative, or executive functions that judges may occasionally be assigned by law to perform; it is the nature of the function performed, adjudication, rather than the identity of the actor who performed it, a judge, that determines whether absolute immunity attaches to the act.[9] Even so, other types of immunity may apply in such circumstances.[10]

CUMULATIVE SUPPLEMENT

Cases:

Quasi-judicial immunity barred pro se plaintiff's claims for damages against county judge in her official capacity, relating to,

inter alia, judge's dismissal of his disciplinary complaint against another judge in connection with that judge's denial of his motion to modify child support; judge had performed adjudicatory functions as member of judicial disciplinary board. Moore v. Yardely, 376 F. Supp. 3d 1004 (D. Neb. 2019).

Circuit court judge had jurisdiction to enter orders denying prisoner's motions for leave to amend to add a Public Records Act claim, which judge deemed were a motion for post-conviction relief, and thus judicial immunity insulated judge from prisoner's claim that judge violated Public Records Act; State Constitution vested jurisdiction in the circuit courts in all matters civil and criminal not vested by the Constitution in some other court. Miss. Code. Ann. § 25-61-15. Pryer v. Gardner, 247 So. 3d 1245 (Miss. 2018).

Judge was entitled to judicial immunity from former court administrator's claim of libel based on judicial orders containing footnotes stating that former administrator had been reprimanded by judge for engaging in improper ex parte communications while she was court administrator, where orders were entered in criminal matters over which judge had subject-matter jurisdiction. Weill v. Bailey, 227 So. 3d 931 (Miss. 2017).

[END OF SUPPLEMENT]

Footnotes

1 Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

2 Mylett v. Mullican, 992 F.2d 1347 (5th Cir. 1993).

3 Regan v. Price, 131 Cal. App. 4th 1491, 33 Cal. Rptr. 3d 130 (3d Dist. 2005).

4 Kalmanson v. Lockett, 848 So. 2d 374 (Fla. 5th DCA 2003).

5 Stiggle v. Tamburini, 467 F. Supp. 2d 183 (D.R.I. 2006).
As to the effect of jurisdiction or the lack thereof on judicial immunity, generally, see §§ 74 to 76.

6 Bright v. Gallia County, Ohio, 753 F.3d 639 (6th Cir. 2014), cert. denied, 135 S. Ct. 1561, 191 L. Ed. 2d 663 (2015); Miller v. County of Nassau, 467 F. Supp. 2d 308 (E.D. N.Y. 2006); Heiskell v. Roberts, 295 Ga. 795, 764 S.E.2d 368 (2014).
A judge does not receive absolute immunity for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity, and a judge does not receive absolute immunity for actions, though judicial in nature, taken in the complete absence of all jurisdiction. Brooks v. Clark County, 828 F.3d 910 (9th Cir. 2016).
To determine whether a judge enjoys absolute immunity, courts apply a two-part test: first, whether the judge performed the actions at issue in a judicial capacity, and if so, whether the judge acted in the clear absence of all jurisdiction. Beepot v. J.P. Morgan Chase Nat. Corporate Services, Inc., 57 F. Supp. 3d 1358 (M.D. Fla. 2014), aff'd, 626 Fed. Appx. 935 (11th Cir. 2015).

7 Dennis v. Sparks, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980).

8 Crooks v. Maynard, 913 F.2d 699 (9th Cir. 1990).

9 Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

10 §§ 70 to 73.

46 Am. Jur. 2d Judges § 68

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

2. Liability for Particular Types of Conduct

a. In General; Conduct Within Scope of Rule of Absolute Judicial Immunity

§ 68. Determination whether act is “judicial” in nature for purposes of judicial immunity

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Judges 35, 36

The role and duties of a judge cannot be neatly compartmentalized, and not all acts by one bearing the title “judge” are judicial.[1] An act by a judicial official need not be formal for it to constitute a judicial act, as would entitle a judicial official to judicial immunity.[2] Difficulties have arisen in attempting to draw the line between truly judicial acts for which immunity is appropriate and acts that simply happen to have been done by judges.[3]

The Supreme Court has thus developed a functional approach to immunity law, justifying and defining immunity by the functions it protects and serves, rather than by the person to whom it attaches,[4] focusing on the judicial character of the act rather than the judicial character of the officer[5] and seeking to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.[6] When a functional analysis of the responsibilities at issue reveals that they are judicial in nature, the actor is entitled to absolute immunity from damages no matter how erroneous the act or injurious the consequences.[7] The functional approach produces distinctions between adjudicatory acts, which are indisputably entitled to absolute immunity, and administrative, legislative, or executive functions.[8] If a defendant government official’s functions are of a judicial nature, the court then must weigh the costs and benefits of denying or affording absolute immunity to the official.[9]

Judges may be exposed to liability for nonjudicial acts[10] and acts performed in the clear absence of all jurisdiction.[11] Moreover, judicial immunity does not extend to certain causes of action seeking injunctive or declaratory relief[12] or to an award of reasonable attorney’s fees in a civil rights action under federal law,[13] even though damages are barred or limited by it.[14]

CUMULATIVE SUPPLEMENT

Cases:

County judge's alleged actions in plaintiff's foreclosure proceedings, including failing to acknowledge plaintiff's legal interest and standing, which had already been established by another judge, enjoining plaintiff from further filing pleadings in foreclosure process, which deprived him of due process of law for appeal, and acting outside judge's delegated jurisdiction in overruling other judge's order, were taken in judge's judicial role, and thus judge was protected by judicial immunity from plaintiff's lawsuit seeking money damages for such alleged transgressions. U.S. Const. Amend. 14. Graves v. Callahan, 253 F. Supp. 3d 330 (D.D.C. 2017).

[END OF SUPPLEMENT]

Footnotes

[1] Mylett v. Mullican, 992 F.2d 1347 (5th Cir. 1993).

[2] Huminski v. Corsones, 396 F.3d 53 (2d Cir. 2005).

[3] Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

[4] Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991); Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988); Brunson v. Murray, 843 F.3d 698 (7th Cir. 2016).

[5] Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 113 S. Ct. 2167, 124 L. Ed. 2d 391 (1993); Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991).

[6] Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991); Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

[7] Brunson v. Murray, 843 F.3d 698 (7th Cir. 2016).

[8] Lemley v. Bowers, 813 F. Supp. 814 (N.D. Ga. 1992).

[9] O'Neal v. Mississippi Bd. of Nursing, 113 F.3d 62 (5th Cir. 1997).

[10] § 70.

[11] § 74.

[12] § 65.

[13] 42 U.S.C.A. § 1983.

[14] Pulliam v. Allen, 466 U.S. 522, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984).
As to the general rule of nonliability for damages in civil rights cases, see § 61.

End of Document

46 Am. Jur. 2d Judges § 69

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

2. Liability for Particular Types of Conduct

a. In General; Conduct Within Scope of Rule of Absolute Judicial Immunity

§ 69. Determination whether act is “judicial” in nature for purposes of judicial immunity—Factors considered

Topic Summary | Correlation Table | References

West’s Key Number Digest

West’s Key Number Digest, Judges 35, 36

Federal courts, in determining whether a judge’s actions are judicial in nature so that the rule of absolute judicial immunity applies,[1] generally consider four factors.[2] These are:
(1) whether the precise act complained of is a normal judicial function or whether the act is normally performed by a judge;[3]
(2) whether the act occurred in the courtroom or appropriate adjunct spaces such as the judge’s chambers;[4]

(3) whether the controversy centered around a case pending before the court;[5] and
(4) whether the parties dealt with the judge or the acts arose directly out of a visit to the judge in the judge’s official capacity.[6]
These four factors are broadly construed in favor of immunity,[7] Immunity may be afforded even though one or more of these factors is not met.[8] In other courts, the following factors are used in determining whether an action is judicial for purposes of judicial immunity: (1) the need to assure that the individual can perform the functions without harassment or intimidation, (2) the presence of safeguards that reduce the need for private-damages actions as a means of controlling unconstitutional conduct, (3) insulation from political influence, (4) the importance of precedent, (5) the adversary nature of the process, and (6) the correctability of error on appeal.[9]

Footnotes

1 § 67.

2 Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993).
As to federal judges, generally, see Am. Jur. 2d, Federal Courts §§ 18 to 148.

[3] Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991).

[4] Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993); JNC Companies v. Ollason, 137 B.R. 46 (D. Ariz. 1991), aff'd, 996 F.2d 1225 (9th Cir. 1993).

[5] Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993); JNC Companies v. Ollason, 137 B.R. 46 (D. Ariz. 1991), aff'd, 996 F.2d 1225 (9th Cir. 1993).

[6] Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991).

[7] Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993); Meyer v. Foti, 720 F. Supp. 1234 (E.D. La. 1989); Wightman v. Jones, 809 F. Supp. 474 (N.D. Tex. 1992).

[8] Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993); Meyer v. Foti, 720 F. Supp. 1234 (E.D. La. 1989).

[9] Blevins v. Hudson, 2016 Ark. 150, 489 S.W.3d 165 (2016), cert. denied, 137 S. Ct. 239, 196 L. Ed. 2d 134 (2016).

End of Document

46 Am. Jur. 2d Judges § 70

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

2. Liability for Particular Types of Conduct

a. In General; Conduct Within Scope of Rule of Absolute Judicial Immunity

§ 70. Nonjudicial acts not subject to immunity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 35, 36

Judges may be exposed to liability for nonjudicial acts[1] since they generally have no judicial immunity for their administrative, legislative, or executive functions.[2] Judges acting in an administrative capacity do not have absolute immunity from suits for damages;[3] administrative decisions, even though essential to the functioning of the court, have not been regarded as judicial acts.[4]

Observation:

The exception from judicial immunity for legislative and executive acts has sometimes been referred to as the "discretionary function exception."[5]

Footnotes

1 Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991).

2 Crooks v. Maynard, 913 F.2d 699 (9th Cir. 1990).

[3] Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

[4] Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 113 S. Ct. 2167, 124 L. Ed. 2d 391 (1993); Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).
As to the general rule of nonliability for damages, see § 61.
As to judicial acts protected by the rule of nonliability for damages, see § 67.

[5] Koelln v. Nexus Residential Treatment Facility, 494 N.W.2d 914 (Minn. Ct. App. 1993).

End of Document

46 Am. Jur. 2d Judges § 71

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

2. Liability for Particular Types of Conduct

a. In General; Conduct Within Scope of Rule of Absolute Judicial Immunity

§ 71. Particular acts as within rule of absolute judicial immunity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 35, 36

Judicial functions or acts entitled to absolute immunity have been held to include:
(1) issuing citations, judgments, and sentences for contempt;[1]
(2) holding preliminary hearings and denying motions;[2]
(3) assigning cases and rendering decisions on pretrial matters;[3]
(4) imposing jail sentences;[4]
(5) directing an executive officer to bring counsel before the court;[5]
(6) disbarring a lawyer without first according the lawyer an opportunity to be heard;[6]
(7) denying an application for admission to a state bar;[7]
(8) enforcing and arbitrating a state's rules of ethics;[8]
(9) appointing a receiver;[9]
(10) researching the law applicable to a plaintiff's tax situation;[10]

(11) signing a court order and providing a copy of it to a newspaper, prior to the filing of the order with the clerk;[11] and
(12) entering an injunction, allegedly in conspiracy with certain private parties to deprive others of particular rights.[12]
Nonjudicial acts, for immunity purposes, have been held to include the selection of jurors[13] and the hiring and firing of court personnel.[14] Administrative actions, such as terminating a court employee, compiling general jury lists, and promulgating an attorney code of conduct, do not fall within the range of judicial actions protected by absolute judicial immunity.[15]

CUMULATIVE SUPPLEMENT

Cases:

Entry of order affirming dismissal of widow's wrongful death action by panel of three Appellate Court justices was judicial act, and thus justices were protected under doctrine of judicial immunity from widow's subsequent civil action alleging that justices deliberately misstated contents of record; justices were presented with controversy to be decided in their judicial capacity, and Appellate Court had subject matter jurisdiction over widow's appeal. 720 Ill. Comp. Stat. Ann. 5/32-8, 5/33-3; Ill. Sup. Ct. R. 23. Moncelle v. McDade, 2017 IL App (3d) 160579, 418 Ill. Dec. 206, 89 N.E.3d 1040 (App. Ct. 3d Dist. 2017).

[END OF SUPPLEMENT]

Footnotes

1 Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993); Crooks v. Maynard, 913 F.2d 699 (9th Cir. 1990).

2 Pokrandt v. Shields, 773 F. Supp. 758 (E.D. Pa. 1991).

3 John v. Barron, 897 F.2d 1387, 16 Fed. R. Serv. 3d 135 (7th Cir. 1990).

4 Moore v. Caponera, 99 Misc. 2d 953, 417 N.Y.S.2d 603 (Sup 1979).

5 Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991).

6 Bradley v. Fisher, 80 U.S. 335, 20 L. Ed. 646, 1871 WL 14737 (1871); Watts v. Burkhart, 978 F.2d 269 (6th Cir. 1992).

7 Sparks v. Character and Fitness Committee of Kentucky, 859 F.2d 428 (6th Cir. 1988); LaNave v. Minnesota Supreme Court, 915 F.2d 386 (8th Cir. 1990).

8 Partington v. Gedan, 961 F.2d 852, 74 Ed. Law Rep. 55, 22 Fed. R. Serv. 3d 580 (9th Cir. 1992), as amended, (July 2, 1992).

9 New Alaska Development Corp. v. Guetschow, 869 F.2d 1298 (9th Cir. 1989).

10 Christensen v. Ward, 916 F.2d 1462 (10th Cir. 1990).

11 Carey v. Dostert, 185 W. Va. 247, 406 S.E.2d 678 (1991).

12 Sparks v. Duval County Ranch Co., Inc., 604 F.2d 976 (5th Cir. 1979), judgment aff'd, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980).

13 Society of Separationists, Inc. v. Herman, 939 F.2d 1207 (5th Cir. 1991), on reh'g, 959 F.2d 1283 (5th Cir. 1992).

14 Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988); Partington v. Gedan, 961 F.2d 852, 74 Ed. Law Rep. 55, 22 Fed. R. Serv. 3d 580 (9th Cir. 1992), as amended, (July 2, 1992).

15 Zeigler v. New York, 948 F. Supp. 2d 271 (N.D. N.Y. 2013).

End of Document

46 Am. Jur. 2d Judges § 72

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

2. Liability for Particular Types of Conduct

b. Conduct Within Scope of Other Types of Immunity

§ 72. Legislative and prosecutorial acts of judge as subject to immunity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 35, 36

While the courts generally have not applied judicial immunity to administrative, legislative, or executive functions,[1] judges may be entitled to a different type of immunity when performing in a nonjudicial capacity. In this regard, judges who act in a legislative capacity are entitled to legislative rather than judicial immunity from suits based on their actions[2] when they promulgate rules,[3] such as a code of conduct for attorneys[4] or mandatory bar membership dues reduction rules,[5] and those who enforce a code of conduct are entitled to prosecutorial immunity.[6]

CUMULATIVE SUPPLEMENT

Cases:

State supreme court justices were not entitled to absolute legislative immunity from suit seeking declaratory and injunctive relief, in attorney's action alleging violation of the First Amendment rights to free speech and association, arising from state's requirement that attorneys join and pay dues to state bar association and the association's use of attorneys' mandatory dues, even though legislative immunity applied to justice's actions taken in enacting rules governing practice of law in state; justices also acted in an enforcement capacity, in addition to a legislative capacity. U.S. Const. Amend. 1. Schell v. Gurich, 409 F. Supp. 3d 1290 (W.D. Okla. 2019).

[END OF SUPPLEMENT]

Footnotes

1 § 67.

2 Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

3 Giannini v. Real, 711 F. Supp. 992, 15 Fed. R. Serv. 3d 559 (C.D. Cal. 1989), judgment aff'd, 911 F.2d 354 (9th Cir. 1990).

4 Berger v. Cuyahoga County Bar Ass'n, 983 F.2d 718 (6th Cir. 1993).

5 Crosetto v. Heffernan, 771 F. Supp. 224 (N.D. Ill. 1990).

6 Supreme Court of Virginia v. Consumers Union of U. S., Inc., 446 U.S. 719, 100 S. Ct. 1967, 64 L. Ed. 2d 641 (1980). As to the immunity of prosecuting attorneys, generally, see Am. Jur. 2d, Prosecuting Attorneys §§ 4 to 6.

46 Am. Jur. 2d Judges § 73

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

2. Liability for Particular Types of Conduct

b. Conduct Within Scope of Other Types of Immunity

§ 73. Acts of judges protected by qualified immunity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 35, 36

Qualified immunity is designed to allow government officials to avoid the expense and disruption of going to trial, and is not merely a defense to liability. When a complaint fails to allege a violation of a clearly established law or when discovery fails to uncover evidence sufficient to create a genuine issue whether the defendant committed such a violation, the qualified immunity defense provides the defendant with immunity from the burdens of trial as well as defense to liability. It specially protects public officials from the specter of damages liability for judgment calls made in a legally uncertain environment. It protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority and done without willfulness, malice, or corruption. The protection of qualified immunity applies regardless of whether a government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.[1]

In some instances, judges performing nonjudicial actions to which absolute immunity does not apply may be entitled to qualified immunity from civil liability for money damages.[2] Courts have recognized this type of immunity to avoid unnecessarily extending the scope of the traditional concept of absolute judicial immunity.[3]

Official, or qualified, immunity protects governmental officials or employees from tort liability for the performance of their discretionary functions, within the course of their employment or official duties. The scope of the discretionary decisions, acts, or omissions protected by official immunity is broader than the functions of governing, with official immunity protecting the kind of discretion exercised at the operational level rather than exclusively at the policy-making or planning level.[4] In this regard, a judge who issued a contempt order to a potential juror, in an attempt to compel the latter to make an affirmation, was entitled to qualified immunity, since the unlawfulness of the judge's actions would not have been apparent to a reasonable official in view of the fact that the statutes and rules usually provide that affirmations are to be offered as an alternative to an oath.[5] On the other hand, there was no qualified immunity for a judge who stopped a motorist on a highway after the latter honked a horn at the judge and motioned the judge to change lanes where state law did not include a judge

within its definition of a peace officer, the use of a red light was a show of authority, the facts did not give rise to probable cause or reasonable suspicion, and the stop constituted an unreasonable seizure.[6] Likewise, a judge is not entitled to qualified immunity from a disgruntled litigant's claim that the judge, by speaking to the media and accusing the litigant of stalking the judge, retaliated against the litigant for engaging in the protected conduct of criticizing the judge and exposing the alleged wrongdoing, as the charged conduct violates clearly established First Amendment rights of which one in the judge's position would be cognizant.[7]

CUMULATIVE SUPPLEMENT

Cases:

Alleged injuries to applicant who was denied firearm license, and to applicant who applied for concealed-carry permit but had been granted only at-home permit, under New York firearm licensing scheme were fairly traceable only to judges acting as pistol permit licensing officers for applicants' counties of residence who denied their respective applications, and not to New York Governor, Attorney General, Superintendent of the State Police, and judge who was licensing officer for another county, and thus applicants lacked standing to bring § 1983 action challenging licensing scheme as violating the Second and Fourteenth Amendments against those latter defendants; there was no indication that the state officials and other judge had any role in licensing process or in consideration of the applications. U.S. Const. Amends. 2, 14; 42 U.S.C.A. § 1983; N.Y. Penal Law § 400.00. Libertarian Party of Erie County v. Cuomo, 970 F.3d 106 (2d Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Am. Jur. 2d, Public Officers and Employees § 314.
As to "absolute immunity," generally, see § 61.

2 Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988); Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993).

3 Forrester v. White, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988); Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993).
As to traditional concept of nonliability, generally, see § 61.

4 Am. Jur. 2d, Public Officers and Employees § 318.

5 Society of Separationists, Inc. v. Herman, 939 F.2d 1207 (5th Cir. 1991), on reh'g, 959 F.2d 1283 (5th Cir. 1992).

6 Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993).

7 Barrett v. Harrington, 130 F.3d 246, 39 Fed. R. Serv. 3d 643, 1997 FED App. 0344P (6th Cir. 1997).

End of Document

46 Am. Jur. 2d Judges § 74

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

3. Effect of Jurisdiction or Lack Thereof

§ 74. Jurisdiction over subject matter and parties required for judicial immunity

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Judges 35, 36

A necessary inquiry in determining whether judges are immune from suit for money damages is whether, at the time a challenged action was taken, there was jurisdiction over the subject matter[1] and the parties.[2] Judges generally are not subject to liability in civil actions for their judicial acts unless they have acted in the clear absence of all jurisdiction.[3] Courts have reasoned that it is necessary to imbue the doctrine of judicial immunity with such broad scope in order to preserve the integrity of the judicial system and ensure that judges render decisions without fear of personal consequences, even though, in some circumstances, it may create unfairness to litigants.[4]

Although some cases have suggested that this means that a judge must have had both subject matter and personal jurisdiction while engaging in the offending conduct, for immunity to apply,[5] it is generally held that a judge is entitled to immunity even if there is no personal jurisdiction over the complaining party.[6]

In some jurisdictions, case law suggests a judge who has subject-matter jurisdiction and a colorable claim of personal jurisdiction is immune from liability for judicial acts,[7] while in others it has been emphasized that immunity has never been denied because of a lack of personal jurisdiction.[8]

Judges are entitled to absolute judicial immunity from damages under civil rights claims for those acts taken while they are acting in their judicial capacity unless they acted in the clear absence of all jurisdiction; a judge does not act in the clear absence of all jurisdiction when the judge acts erroneously, maliciously, or in excess of authority, but instead, only when the judge acts without subject-matter jurisdiction.[9] A clear absence of all jurisdiction generally is held to mean a clear lack of subject-matter jurisdiction,[10] and judicial immunity is a defense so long as a judge's ultimate acts are judicial actions taken within the court's subject-matter jurisdiction.[11] This subject-matter jurisdiction may be provided by a state constitution giving the courts in question original jurisdiction over all civil matters[12] or, in the context of a bankruptcy court proceeding, by the fact that the matter is arguably within the broad scope of matters which ordinarily come before the bankruptcy courts.[13] However, in other jurisdictions, an absence of all jurisdiction exists subjecting a judge to civil liability when the judge lacks

either personal or subject-matter jurisdiction over the controversy, but, nevertheless, takes action in a judicial capacity that violates the rights of a party to the lawsuit.[14]

Footnotes

1 Smithson v. Ray, 427 F. Supp. 11 (E.D. Tenn. 1976); In re Luna, 152 B.R. 11 (Bankr. D. Mass. 1993).

2 Smithson v. Ray, 427 F. Supp. 11 (E.D. Tenn. 1976).

3 Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978); Alexander v. Rosen, 804 F.3d 1203 (6th Cir. 2015); Walthour v. Child and Youth Services, 728 F. Supp. 2d 628 (E.D. Pa. 2010).
Civil liability attaches if a judge acts in an absence of all jurisdiction. Borkowski v. Abood, 117 Ohio St. 3d 347, 2008-Ohio-857, 884 N.E.2d 7 (2008).

4 Carey v. Dostert, 185 W. Va. 247, 406 S.E.2d 678 (1991).

5 Hopkins v. INA Underwriters Ins. Co., 44 Ohio App. 3d 186, 542 N.E.2d 679 (4th Dist. Pickaway County 1988).

6 New Alaska Development Corp. v. Guetschow, 869 F.2d 1298 (9th Cir. 1989).

7 Almon v. Battles, 541 So. 2d 519 (Ala. 1989).

8 Parker v. State, 92 Md. App. 540, 609 A.2d 347 (1992), judgment aff'd, 337 Md. 271, 653 A.2d 436 (1995).

9 McCall v. Montgomery Housing Authority, 809 F. Supp. 2d 1314 (M.D. Ala. 2011).
A judge who has general judicial authority to perform kinds of acts for which the judge is sued is absolutely immune from civil liability for those acts unless the act is performed when there is clearly no jurisdiction over the subject matter and the want of jurisdiction is known to the judge. Keller-Bee v. State, 448 Md. 300, 138 A.3d 1253 (2016).

10 JNC Companies v. Ollason, 137 B.R. 46 (D. Ariz. 1991), aff'd, 996 F.2d 1225 (9th Cir. 1993); Bailey v. Utah State Bar, 846 P.2d 1278 (Utah 1993).

11 Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993); John v. Barron, 897 F.2d 1387, 16 Fed. R. Serv. 3d 135 (7th Cir. 1990).

12 Malina v. Gonzales, 994 F.2d 1121 (5th Cir. 1993); John v. Barron, 897 F.2d 1387, 16 Fed. R. Serv. 3d 135 (7th Cir. 1990).

13 JNC Companies v. Ollason, 137 B.R. 46 (D. Ariz. 1991), aff'd, 996 F.2d 1225 (9th Cir. 1993).

14 Borkowski v. Abood, 117 Ohio St. 3d 347, 2008-Ohio-857, 884 N.E.2d 7 (2008).

46 Am. Jur. 2d Judges § 75

American Jurisprudence, Second Edition | May 2021 Update

Judges
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VIII. Liabilities

A. Civil Liability

3. Effect of Jurisdiction or Lack Thereof

§ 75. Acts in determining jurisdiction for purposes of judicial immunity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 35, 36

Judges who decide the question of their jurisdiction wrongly are not liable[1] for acts done pursuant to an erroneous decision that there is jurisdiction in a particular case.[2] Where jurisdiction of the subject matter is invested by law in either the judge or the court which the judge holds, the manner and the extent in which jurisdiction is exercised generally are as much questions for the judge's determination as any other question involved in the case, although the validity of the judgment may depend upon the correctness of the judge's determination.[3]

Observation:

Since the control of the docket is a key function to the proper workings of a court, an appellate court judge who errs in the belief that the judge has authority to delay an appeal at most commits a grave procedural error, not an act undertaken in the clear absence of all jurisdiction.[4]

Footnotes

[1] Ray v. Huddleston, 212 F. Supp. 343 (W.D. Ky. 1963), judgment aff'd, 327 F.2d 61 (6th Cir. 1964); Lucas v. Central Missouri Trust Co., 349 Mo. 537, 162 S.W.2d 569 (1942).

[2] Lucas v. Central Missouri Trust Co., 349 Mo. 537, 162 S.W.2d 569 (1942).

[3] Dellenbach v. Letsinger, 889 F.2d 755 (7th Cir. 1989); Lucas v. Central Missouri Trust Co., 349 Mo. 537, 162 S.W.2d 569 (1942).

[4] Dellenbach v. Letsinger, 889 F.2d 755 (7th Cir. 1989).
As to liability for decisions involving grave procedural errors, generally, see § 64.

End of Document

46 Am. Jur. 2d Judges § 76

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

A. Civil Liability

3. Effect of Jurisdiction or Lack Thereof

§ 76. Acts of judge under invalid law or in excess of jurisdiction as subject to immunity

Topic Summary | Correlation Table | References

West's Key Number Digest
West's Key Number Digest, Judges 35, 36

The scope of judicial jurisdiction generally is broadly construed,[1] such that judges who possess jurisdiction are not deprived of absolute immunity by the mere fact that they act upon a void or invalid law,[2] and absolute immunity will apply to judges acting in the exercise of their judicial functions even if the acts are in excess of their jurisdiction or authority.[3] As a general matter, when a judge acts in an official judicial capacity and has personal and subject-matter jurisdiction over a controversy, the judge is exempt from civil liability even if the judge goes beyond, or exceeds, the judge's authority and acts in excess of jurisdiction.[4] Actions taken by a judge that are determined to be in excess of jurisdiction, resulting from an error in judgment, will not cause a judge to lose immunity.[5] A distinction must be observed between acts which are merely in excess of jurisdiction and those involving a clear absence of all jurisdiction over the subject matter.[6] Where there is clearly no jurisdiction over the subject matter, any authority exercised is usurped authority, and no excuse is permissible if the judge knows of the lack of authority.[7]

Observation:

A judge pro tem who has jurisdiction to hear a case to its conclusion once the judge pro tem begins hearing evidence does not act in the clear absence of all jurisdiction in issuing a search warrant[8] or in refusing to issue a peace bond and a warrant for the arrest of one person, while issuing a warrant for another's arrest,[9] even though the judicial term has expired.[10]

CUMULATIVE SUPPLEMENT

Cases:

Where there is clearly no jurisdiction over the subject-matter, any authority exercised by the judge is a usurped authority, and for the exercise of such authority, where the want of jurisdiction is known to the judge, no excuse is permissible, under the doctrine of absolute immunity, for liability arising out of the exercise of such authority. Viers v. Baker, 841 S.E.2d 857 (Va. 2020).

[END OF SUPPLEMENT]

Footnotes

1 In re Luna, 152 B.R. 11 (Bankr. D. Mass. 1993); Hall v. Jones, 2015 Ark. 2, 453 S.W.3d 674 (2015).

2 Carey v. Dostert, 185 W. Va. 247, 406 S.E.2d 678 (1991).

3 Mireles v. Waco, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991); Beepot v. J.P. Morgan Chase Nat. Corporate Services, Inc., 57 F. Supp. 3d 1358 (M.D. Fla. 2014), aff'd, 626 Fed. Appx. 935 (11th Cir. 2015).

4 Borkowski v. Abood, 117 Ohio St. 3d 347, 2008-Ohio-857, 884 N.E.2d 7 (2008).

5 Borkowski v. Abood, 117 Ohio St. 3d 347, 2008-Ohio-857, 884 N.E.2d 7 (2008).

6 Dellenbach v. Letsinger, 889 F.2d 755 (7th Cir. 1989); Derringer v. Chapel, 98 Fed. Appx. 728 (10th Cir. 2004).

7 Dellenbach v. Letsinger, 889 F.2d 755 (7th Cir. 1989).

8 Hupp v. Hill, 576 N.E.2d 1320 (Ind. Ct. App. 1991).

9 Moore v. Taylor, 541 So. 2d 378, 53 Ed. Law Rep. 348 (La. Ct. App. 2d Cir. 1989).

10 Hupp v. Hill, 576 N.E.2d 1320 (Ind. Ct. App. 1991); Moore v. Taylor, 541 So. 2d 378, 53 Ed. Law Rep. 348 (La. Ct. App. 2d Cir. 1989).

End of Document

46 Am. Jur. 2d Judges VIII B Refs.

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

B. Criminal Liability; Contempt

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 38

A.L.R. Library

A.L.R. Index, Judges
West's A.L.R. Digest, Judges 38

End of Document

46 Am. Jur. 2d Judges § 77

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

B. Criminal Liability; Contempt

§ 77. Criminal liability of judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 38

A.L.R. Library

Constitutional issues relating to federal criminal prosecution of federal judge, 65 A.L.R. Fed. 819

The doctrine of judicial immunity is applicable only to civil actions for judicial acts and does not render judges immune to criminal proceedings in the event they are charged with the commission of a crime.[1] Judges are subject to criminal prosecutions as are other citizens[2] and may be held responsible for the violation of a criminal statute to the same extent.[3] Judicial officers are not immunized from criminal prosecution by the availability of sui generis proceedings, such as impeachment and removal from office.[4] If a state constitution makes state judges subject to legislative impeachment for misconduct in office, conviction or acquittal on those charges does not bar criminal prosecution if the alleged conduct is punishable as a crime,[5] and a sitting federal judge may be indicted and tried for a criminal offense without first being impeached and convicted by Congress.[6]

Footnotes

1 Strawbridge v. Bednarik, 460 F. Supp. 1171 (E.D. Pa. 1978); B.K. v. Cox, 116 S.W.3d 351 (Tex. App. Houston 14th Dist. 2003).
As to the general rule of nonliability for damages in civil cases, see § 61.

2 Dennis v. Sparks, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980).

[3] Boags v. Municipal Court, 197 Cal. App. 3d 65, 242 Cal. Rptr. 681 (2d Dist. 1987).

[4] Boags v. Municipal Court, 197 Cal. App. 3d 65, 242 Cal. Rptr. 681 (2d Dist. 1987).

[5] Boags v. Municipal Court, 197 Cal. App. 3d 65, 242 Cal. Rptr. 681 (2d Dist. 1987).

[6] Claiborne v. U.S., 465 U.S. 1305, 104 S. Ct. 1401, 79 L. Ed. 2d 665 (1984).

End of Document

46 Am. Jur. 2d Judges § 78

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

B. Criminal Liability; Contempt

§ 78. Criminal liability of judge—Liability for judicial acts and official misconduct

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 38

In the absence of statute, judges generally cannot be held criminally liable for any of their judicial acts, however erroneous, so long as they act in good faith.[1] Judges incur no criminal liability in neglecting to perform mandatory duties imposed upon them by statute if the statute does not make a failure to comply with the law an offense.[2]

On the other hand, a state's penal law may provide criminal penalties for official misconduct.[3] In some jurisdictions, judges may be held criminally responsible when they act fraudulently or corruptly.[4]

Caution:

A statute making a willful omission by a public officer to perform duties punishable as a misdemeanor violates a state's constitutional separation of powers provision, as applied to judicial officers engaged in the performance of their official duties, since the executive branch of government may not be given discretion to commence a criminal action against a judge whenever it considers there is a failure to properly perform judicial duties.[5]

Footnotes

[1] Braatelien v. U. S., 147 F.2d 888 (C.C.A. 8th Cir. 1945); McFarland v. State, 172 Neb. 251, 109 N.W.2d 397 (1961); In re Mattera, 34 N.J. 259, 168 A.2d 38 (1961).

[2] Com. v. Tartar, 239 S.W.2d 265 (Ky. 1951).

[3] People v. La Carrubba, 46 N.Y.2d 658, 416 N.Y.S.2d 203, 389 N.E.2d 799 (1979).

[4] Braatelien v. U. S., 147 F.2d 888 (C.C.A. 8th Cir. 1945); McFarland v. State, 172 Neb. 251, 109 N.W.2d 397 (1961).

[5] Boags v. Municipal Court, 197 Cal. App. 3d 65, 242 Cal. Rptr. 681 (2d Dist. 1987).

End of Document

46 Am. Jur. 2d Judges § 79

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

VIII. Liabilities

B. Criminal Liability; Contempt

§ 79. Judges as subject to contempt

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 38

Judges generally may not be subjected to contempt citations solely for acting in excess of their jurisdiction or for entering either an erroneous ruling or one that is the result of misunderstanding, inadvertence, or confusion.[1]

However, judges are not immune from a superior court's contempt powers.[2] They may be held in contempt by the superior court for a violation of rules made for the conduct of their office,[3] or for actions contrary to an unambiguous order of a superior court of which they have been made aware, without proof of intent.[4] The rule of judicial immunity may not be invoked in a contempt proceeding against a judge who obstructs the proceedings and hinders the administration of justice in another court in a matter of which it has jurisdiction if the conduct is calculated to destroy the authority, dignity, and integrity of the other court.[5]

Footnotes

1 State ex rel. Schwartz v. Lantz, 440 So. 2d 446 (Fla. 3d DCA 1983).

2 State ex rel. Schwartz v. Lantz, 440 So. 2d 446 (Fla. 3d DCA 1983).

3 In re Mattera, 34 N.J. 259, 168 A.2d 38 (1961).

4 State ex rel. Schwartz v. Lantz, 440 So. 2d 446 (Fla. 3d DCA 1983).

5 McFarland v. State, 172 Neb. 251, 109 N.W.2d 397 (1961).

Works.

46 Am. Jur. 2d Judges IX A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IX. Disqualification to Act in Particular Case

A. Disqualification to Act in Particular Case, in General

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Judges 39, 40

A.L.R. Library

A.L.R. Index, Judges
A.L.R. Index, Recusal
West's A.L.R. Digest, Judges 39, 40

End of Document

46 Am. Jur. 2d Judges § 80

American Jurisprudence, Second Edition | May 2021 Update

Judges
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IX. Disqualification to Act in Particular Case

A. Disqualification to Act in Particular Case, in General

§ 80. Disqualification of judge to act in particular case, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 39, 40

Trial Strategy

Disqualification of Trial Judge for Cause, 50 Am. Jur. Proof of Facts 3d 449

Litigants have a right to have their causes tried fairly in court by an impartial tribunal[1] and are entitled to the due process requirement of a hearing before a fair and impartial tribunal.[2] In order to insure a fair and impartial hearing of the issues involved,[3] and to guarantee that no judge will preside in a case in which he or she is not wholly free, disinterested, and independent,[4] a judge will be disqualified in an action in which he or she is interested or prejudiced.

Observation:

The opportunity to disqualify a judge is statutory and not a constitutional right, except as it may be implicit in a right to a fair trial.[5] The constitutional basis is the floor, or minimum protection, afforded to litigants against a judge's bias or prejudice.[6]

The requirement of a fair trial in a fair tribunal includes the requirement that any judge who is biased or partial with regard to a particular matter or party be disqualified from hearing the case.[7] Disqualification is called for where financial or other conflicts of interest exist or where a judge otherwise cannot act impartially.[8] Moreover, a judge should disqualify him- or

herself in situations where his or her impartiality might reasonably be questioned,[9] even where no actual bias exists.[10] Once a judge concludes that there are grounds for recusal, he or she must completely disassociate him- or herself from participating in the case.[11] The possible consequences of a judge's recusal on the commencement of a trial are immaterial.[12]

Distinction:

"Recusal" is the process by which a trial court voluntarily removes itself, while "disqualification" is the process by which a party seeks to remove a judge from the case.[13]

While the right of a litigant to unilaterally disqualify a judge is one of the keystones of our legal administrative edifice,[14] the power to disqualify a judge is a privilege and may not be used to achieve irrational ends.[15] Recusal is left to the discretion of the trial judge,[16] whose decision will not be reversed absent a showing of an abuse of discretion.[17]

Footnotes

1 Am. Jur. 2d, Trial § 130.

2 Am. Jur. 2d, Constitutional Law § 1020.

3 Peracchi v. Superior Court, 30 Cal. 4th 1245, 135 Cal. Rptr. 2d 639, 70 P.3d 1054 (2003); Litinsky v. Querard, 683 P.2d 816 (Colo. App. 1984); State v. Dunlap, 155 Idaho 345, 313 P.3d 1 (2013).

4 Dacey v. Connecticut Bar Ass'n, 184 Conn. 21, 441 A.2d 49 (1981); State v. Meyer, 1 Kan. App. 2d 29, 561 P.2d 877 (1977); Com. ex rel. Meredith v. Murphy, 295 Ky. 466, 174 S.W.2d 681 (1943); State v. Hayes, 199 La. 549, 6 So. 2d 657 (1942); State v. Muraski, 6 N.J. Super. 36, 69 A.2d 745 (App. Div. 1949).

5 Hirning v. Dooley, 2004 SD 52, 679 N.W.2d 771 (S.D. 2004).

6 State v. Moyer, 302 Kan. 892, 360 P.3d 384 (2015).

7 State v. Dunsmore, 2015 MT 108, 378 Mont. 514, 347 P.3d 1220 (2015).
As to grounds for disqualification, see §§ 86 to 162.

8 People ex rel. Person v. Miller, 56 Ill. App. 3d 450, 13 Ill. Dec. 920, 371 N.E.2d 1012 (1st Dist. 1977).

9 Ferguson v. State, 2016 Ark. 319, 498 S.W.3d 733 (2016); Carpenter v. U.S., 144 A.3d 1141 (D.C. 2016); Lue v. Eady, 297 Ga. 321, 773 S.E.2d 679 (2015); Indiana Gas Co. v. Indiana Finance Authority, 992 N.E.2d 678 (Ind. 2013); In re Howes, 880 N.W.2d 184 (Iowa 2016); Draggin' Y Cattle Co., Inc. v. Addink, 2016 MT 98, 383 Mont. 243, 371 P.3d 970 (2016); Achille v. Achille, 167 N.H. 706, 117 A.3d 1144 (2015); O'Neill v. O'Neill, 2016 SD 15, 876 N.W.2d 486 (S.D. 2016).

10 People v. Hall, 157 Ill. 2d 324, 193 Ill. Dec. 98, 626 N.E.2d 131 (1993); State v. Ely, 295 Neb. 607, 889 N.W.2d 377 (2017); O'Neill v. O'Neill, 2016 SD 15, 876 N.W.2d 486 (S.D. 2016).
A judge should disqualify him- or herself when circumstances and conditions surrounding the litigation are of such nature that they might cast doubt and question as to the impartiality of any judgment. Craig v. Walker, 1992 OK 1, 824 P.2d 1131 (Okla. 1992).

11 Parenteau v. Jacobson, 32 Mass. App. Ct. 97, 586 N.E.2d 15 (1992); Kane Properties, LLC v. City of Hoboken, 214 N.J. 199, 68 A.3d 1274 (2013).

[12] Parenteau v. Jacobson, 32 Mass. App. Ct. 97, 586 N.E.2d 15 (1992).

[13] Forrest v. State, 904 So. 2d 629 (Fla. 4th DCA 2005).

[14] State ex rel. Heistand v. McGuire, 701 S.W.2d 419 (Mo. 1985).

[15] State ex rel. Ott v. Bonacker, 791 S.W.2d 494 (Mo. Ct. App. S.D. 1990).

[16] Kaufman v. Court of Appeal, 31 Cal. 3d 933, 184 Cal. Rptr. 302, 647 P.2d 1081 (1982); Bradbury v. Idaho Judicial Council, 149 Idaho 107, 233 P.3d 38 (2009); Minks v. Com., 427 S.W.3d 802 (Ky. 2014); Haddad v. Gonzalez, 410 Mass. 855, 576 N.E.2d 658 (1991); O'Neill v. O'Neill, 2016 SD 15, 876 N.W.2d 486 (S.D. 2016).

[17] Kaufman v. Court of Appeal, 31 Cal. 3d 933, 184 Cal. Rptr. 302, 647 P.2d 1081 (1982); Haddad v. Gonzalez, 410 Mass. 855, 576 N.E.2d 658 (1991).

End of Document

46 Am. Jur. 2d Judges § 81

American Jurisprudence, Second Edition | May 2021 Update

Judges
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IX. Disqualification to Act in Particular Case

A. Disqualification to Act in Particular Case, in General

§ 81. Statutes governing disqualification of judge

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 39, 40

A.L.R. Library

Disqualification of judge under 28 U.S.C.A. s 455(b)(4), providing for disqualification where judge has financial or other interest in proceeding, 163 A.L.R. Fed. 575

The disqualification of trial judges is an aspect of the judicial system that is subject to reasonable legislative regulation,[1] although such regulations are subject to constitutional requirements with respect to uniformity and impartiality of operation.[2] Most disputes over the disqualification of judges will thus be resolved without resort to the Constitution; that is, legislative or Judicial Codes of Conduct will generally be resorted to in resolving judicial disqualification questions.[3] Statutes governing disqualification of judges are meant to be self-enforcing.[4]

Practice Tip:

New statutory disqualification provisions will not be applied retroactively.[5]

The purpose of a judicial recusal statute requiring a judge to disqualify him- or herself when the judge's impartiality might reasonably be questioned is to promote public confidence in the integrity of the judicial process.[6] However, a disqualification

statute is not intended as an instrument to secure delays or postponement of a trial,[7] and should not be employed to produce inconvenience and absurdity.[8]

Footnotes

1 Industrial Indemnity Co. v. Superior Court, 214 Cal. App. 3d 259, 262 Cal. Rptr. 544 (1st Dist. 1989).

2 § 82.

3 State v. Shackelford, 155 Idaho 454, 314 P.3d 136 (2013).

4 Pope v. State, 257 Ga. 32, 354 S.E.2d 429 (1987).

5 Pueblo of Laguna v. Cillessen & Son, Inc., 1984-NMSC-060, 101 N.M. 341, 682 P.2d 197 (1984).

6 Clemmons v. Wolfe, 377 F.3d 322 (3d Cir. 2004); In re Advisory Letter No. 7-11 of Supreme Court Advisory Committee on Extrajudicial Activities, 213 N.J. 63, 61 A.3d 136 (2013).

7 State ex rel. Leavitt v. District Court of Thirteenth Judicial Dist. In and For Yellowstone County, 172 Mont. 12, 560 P.2d 517 (1977).

8 City of Kansas City v. Wiley, 697 S.W.2d 240 (Mo. Ct. App. W.D. 1985).

End of Document

46 Am. Jur. 2d Judges § 82

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IX. Disqualification to Act in Particular Case

A. Disqualification to Act in Particular Case, in General

§ 82. Statutes governing disqualification of judge—Validity of statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 39, 40

A.L.R. Library

Laws Governing Judicial Recusal or Disqualification in State Proceeding as Violating Federal or State Constitution, 91 A.L.R.5th 437

Recusal statutes must be considered in light of the constitutional authority of a state's highest court to administer the courts of the state.[1] Some courts have held that a statute authorizing a litigant or attorney to remove a judge from a case by filing an affidavit alleging the judge's prejudice does not violate the state's separation of powers doctrine,[2] while other courts have taken the contrary view.[3] Statutes providing for disqualification based solely on an application in writing have been found unconstitutional because they essentially permit a party to exercise a peremptory challenge of a judge. However, a disqualification statute that does not contain an outright hindrance of a court's ability to adjudicate a case or the substantial destruction of the exercise of a power essential to the judiciary does not violate a state constitution which provides for judicial power and the election of judges, because there is a rationality requirement in the statute.[4]

Caution:

A stipulation or agreement to disqualify a judge has been found unconstitutional under the separation of powers doctrine.[5]

A statute which provides that a litigant in certain courts may, by filing a peremptory challenge of the judge assigned to try the cause, obtain the assignment of another judge but which makes no provision for a similar challenge by litigants in other courts exercising the same powers and jurisdiction violates a constitutional requirement that all laws of a general nature must have a uniform operation. However, a statute providing that any party, except the prosecution in a criminal case, may, by filing a peremptory challenge of the judge assigned to try the cause, obtain the assignment of another judge, does not, by reason of the exception therein made, violate a constitutional provision that no citizen or class of citizens will be granted privileges or immunities which upon the same terms will not be granted to all citizens.[6]

Footnotes

1 Ferren v. City of Sea Isle City, 243 N.J. Super. 522, 580 A.2d 737 (App. Div. 1990).

2 In re Daniel R., 291 Ill. App. 3d 1003, 225 Ill. Dec. 900, 684 N.E.2d 891 (1st Dist. 1997); Traynor v. Leclerc, 1997 ND 47, 561 N.W.2d 644 (N.D. 1997); State v. Holmes, 106 Wis. 2d 31, 315 N.W.2d 703 (1982).

3 Johnson v. Goldman, 94 Nev. 6, 575 P.2d 929 (1978) (a peremptory challenge was permitted without the necessity of filing an affidavit of bias or prejudice).

4 State ex rel. Kafoury v. Jones, 315 Or. 201, 843 P.2d 932 (1992).

5 People v. Superior Court (Mudge), 54 Cal. App. 4th 407, 62 Cal. Rptr. 2d 721 (2d Dist. 1997), as modified on other grounds, (May 9, 1997).

6 Austin v. Lambert, 11 Cal. 2d 73, 77 P.2d 849, 115 A.L.R. 849 (1938).

End of Document

46 Am. Jur. 2d Judges § 83

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IX. Disqualification to Act in Particular Case

A. Disqualification to Act in Particular Case, in General

§ 83. Statutes governing disqualification of judge—Construction of statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 39, 40

A.L.R. Library

Interest of judge in an official or representative capacity, or relationship of judge to one who is a party in an official or representative capacity, as disqualification, 10 A.L.R.2d 1307

Some jurisdictions consider that statutes providing for the disqualification of judges must be strictly construed.[1] Under a theory of strict construction, all grounds for recusing a judge are specified in the appropriate statute, which must then be strictly construed to hold that a mere appearance of impropriety, not statutorily listed, cannot be a basis for recusal.[2]

On the other hand, other jurisdictions consider that disqualification statutes must be construed liberally[3] to promote and maintain public confidence in the judicial system[4] and to permit, rather than prevent, the substitution of judges.[5] This interpretation is premised on the theory that such a statute, although in derogation of the common law, is remedial and therefore should be given a liberal construction so as to effect the intent of the legislature,[6] and that a liberal interpretation is required to protect the guarantee of a fair and impartial trial that is implicit in our legal system.[7]

Footnotes

1 Lopez v. Kearney ex rel. County of Pima, 222 Ariz. 133, 213 P.3d 282 (Ct. App. Div. 2 2009); People in Interest of A.L.C., 660 P.2d 917 (Colo. App. 1982); Pierce v. Charity Hosp. of Louisiana at New Orleans, 550 So. 2d 211 (La. Ct. App. 4th Cir. 1989), writ denied, 551 So. 2d 1341 (La. 1989); Gerety v. Demers, 1978-NMSC-097, 92 N.M. 396, 589 P.2d 180 (1978).

[2] Pierce v. Charity Hosp. of Louisiana at New Orleans, 550 So. 2d 211 (La. Ct. App. 4th Cir. 1989), writ denied, 551 So. 2d 1341 (La. 1989).

[3] Le Louis v. Superior Court, 209 Cal. App. 3d 669, 257 Cal. Rptr. 458 (5th Dist. 1989); King v. State, 246 Ga. 386, 271 S.E.2d 630, 16 A.L.R.4th 545 (1980); Bowman v. Ottney, 2015 IL 119000, 400 Ill. Dec. 640, 48 N.E.3d 1080 (Ill. 2015); State ex rel. Wesolich v. Goeke, 794 S.W.2d 692 (Mo. Ct. App. E.D. 1990).

[4] Le Louis v. Superior Court, 209 Cal. App. 3d 669, 257 Cal. Rptr. 458 (5th Dist. 1989); State ex rel. Wesolich v. Goeke, 794 S.W.2d 692 (Mo. Ct. App. E.D. 1990).

[5] King v. State, 246 Ga. 386, 271 S.E.2d 630, 16 A.L.R.4th 545 (1980); Bowman v. Ottney, 2015 IL 119000, 400 Ill. Dec. 640, 48 N.E.3d 1080 (Ill. 2015); State ex rel. Horton v. House, 646 S.W.2d 91 (Mo. 1983).

[6] King v. State, 246 Ga. 386, 271 S.E.2d 630, 16 A.L.R.4th 545 (1980).

[7] People v. Flowers, 47 Ill. App. 3d 809, 8 Ill. Dec. 268, 365 N.E.2d 506 (1st Dist. 1977).

End of Document

46 Am. Jur. 2d Judges § 84

American Jurisprudence, Second Edition | May 2021 Update

Judges
Glenda K. Harnad, J.D.; and Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.

IX. Disqualification to Act in Particular Case

A. Disqualification to Act in Particular Case, in General

§ 84. Disqualification of judge as yielding to necessity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Judges 39, 40

A.L.R. Library

Construction and Application of Rule of Necessity Providing that Administrative or Quasi-judicial Officer Is Not Disqualified to Determine a Matter Because of Bias or Personal Interest if Case Cannot Be Heard Otherwise, 28 A.L.R.6th 175

Construction and Application of Rule of Necessity in Judicial Actions, Providing that a Judge Is Not Disqualified to Try a Case Because of Personal Interest If Case Cannot Be Heard Otherwise, 27 A.L.R.6th 403

Trial Strategy

Disqualification of Trial Judge for Cause, 50 Am. Jur. Proof of Facts 3d 449

Forms

Forms relating to rule of necessity, see Am. Jur. Pleading and Practice Forms, Judges [Westlaw®(r) Search Query]

Generally, the rule of disqualification of judges must yield to the demands of necessity.[1] The rule of necessity means that a judge is not disqualified to sit in a case if there is no other judge available to hear and decide the case.[2] The rule of necessity generally requires a judge to remain in a case regardless of the judge's preference, if the sole power to decide a controversy resides in that official.[3]

Under the rule of necessity, if the only judges authorized by law to decide a case all have an interest in the outcome of the case, that interest is not disqualifying because judges have the absolute duty to hear and decide cases within their jurisdiction.[4] Thus, when all judges would be disqualified, none are disqualified,[5] and disqualification will not be permitted to destroy the only tribunal with power in the premises.[6]

The rule of necessity reflects the longstanding principle that to deny an individual access to courts for the vindication of his or her rights constitutes a far more egregious wrong than to permit a judge to hear a matter in which he or she has some interest.[7] The doctrine of necessity is most often applied where the interest of the judge is tenuous,[8] and will not apply where there is anyone else who can act in place of the interested administrative or judicial officer.[9]

Judges have been required, out of necessity, to rule on matters affecting their salaries,[10] retirement compensation,[11] and other benefits.[12]

Similarly, due process considerations allow a biased administrative agency to make a decision which no other entity is allowed to make, and the rule of necessity permits such a body to proceed in spite of its possible bias or self-interest.[13]

CUMULATIVE SUPPLEMENT

Cases:

Even if judicial elections had resulted in conflict of interest with respect to imposition of death penalty, judge presiding over capital murder defendant's trial was not subject to disqualification; any conflict of interest would apply equally to all state judges, and thus common law rule of necessity would preclude disqualification. People v. Johnsen, 10 Cal. 5th 1116, 274 Cal. Rptr. 3d 599, 480 P.3d 2 (Cal. 2021).

[END OF SUPPLEMENT]

Footnotes

1 U. S. v. Will, 449 U.S. 200, 101 S. Ct. 471, 66 L. Ed. 2d 392 (1980); Haase v. Countrywide Home Loans, Incorporated, 838 F.3d 665 (5th Cir. 2016); Fields v. Elected Officials' Retirement Plan, 234 Ariz. 214, 320 P.3d 1160 (2014); Gilbert v. Chiang, 227 Cal. App. 4th 537, 173 Cal. Rptr. 3d 864 (4th Dist. 2014); In re Howes, 880 N.W.2d 184 (Iowa 2016); New York State Ass'n of Criminal Defense Lawyers v. Kaye, 95 N.Y.2d 556, 721 N.Y.S.2d 588, 744 N.E.2d 123 (2000); Moro v. State, 354 Or. 657, 320 P.3d 539 (2014); Hooker v. Haslam, 393 S.W.3d 156 (Tenn. 2012); In re Judicial Disciplinary Proceedings Against Prosser, 2012 WI 103, 343 Wis. 2d 548, 817 N.W.2d 875 (2012).

2 Fields v. Elected Officials' Retirement Plan, 234 Ariz. 214, 320 P.3d 1160 (2014); Olson v. Cory, 27 Cal. 3d 532, 178 Cal. Rptr. 568, 636 P.2d 532 (1980); Nellius v. Stiftel, 402 A.2d 359 (Del. 1978); Schwab v. Ariyoshi, 57 Haw. 348, 555 P.2d 1329 (1976).
As to a judge's interest in a case as being grounds for disqualification, generally, see § 88.

3 Lockett v. Evans, 2014 OK 33, 356 P.3d 58 (Okla. 2014).

4 Moro v. State, 357 Or. 167, 351 P.3d 1 (2015).

[5] Eismann v. Miller, 101 Idaho 692, 619 P.2d 1145 (1980); Crain v. Missouri State Employees' Retirement System, 613 S.W.2d 912 (Mo. Ct. App. W.D. 1981); Grinnell v. State, 121 N.H. 823, 435 A.2d 523 (1981); In re Judicial Disciplinary Proceedings Against Prosser, 2012 WI 103, 343 Wis. 2d 548, 817 N.W.2d 875 (2012).

[6] E & E Hauling, Inc. v. Pollution Control Bd., 116 Ill. App. 3d 586, 71 Ill. Dec. 587, 451 N.E.2d 555 (2d Dist. 1983), judgment aff'd, 107 Ill. 2d 33, 89 Ill. Dec. 821, 481 N.E.2d 664 (1985); Board of Trustees of Public Employees' Retirement Fund v. Hill, 472 N.E.2d 204 (Ind. 1985).

[7] In re Howes, 880 N.W.2d 184 (Iowa 2016).

[8] Com. v. Loretta, 386 Mass. 794, 438 N.E.2d 56 (1982).

[9] Board of Educ. of Community Consol. High School Dist. No. 230, Cook County v. Illinois Educational Labor Relations Bd., 165 Ill. App. 3d 41, 116 Ill. Dec. 91, 518 N.E.2d 713, 44 Ed. Law Rep. 530 (4th Dist. 1987); Payne v. Lee, 222 Minn. 269, 24 N.W.2d 259 (1946).

[10] Schwab v. Ariyoshi, 57 Haw. 348, 555 P.2d 1329 (1976); Pines v. State, 115 A.D.3d 80, 979 N.Y.S.2d 142 (2d Dep't 2014).

[11] Fields v. Elected Officials' Retirement Plan, 234 Ariz. 214, 320 P.3d 1160 (2014); Eismann v. Miller, 101 Idaho 692, 619 P.2d 1145 (1980); Crain v. Missouri State Employees' Retirement System, 613 S.W.2d 912 (Mo. Ct. App. W.D. 1981); Grinnell v. State, 121 N.H. 823, 435 A.2d 523 (1981); Moro v. State, 354 Or. 657, 320 P.3d 539 (2014); Wagoner v. Gainer, 167 W. Va. 139, 279 S.E.2d 636 (1981).

[12] Eismann v. Miller, 101 Idaho 692, 619 P.2d 1145 (1980).

[13] Am. Jur. 2d, Administrative Law § 37.

End of Document